[Cite as *State v. Adams*, 2009-Ohio-6491.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

STATE OF OHIO,	:	Case Nos. 04CA2959
	:	05CA2986
Plaintiff-Appellee,	:	
	:	DECISION AND
v.	:	JUDGMENT ENTRY
	:	
JOHN M. ADAMS,	:	
	:	**Released 12/8/09**
Defendant-Appellant.	:	

APPEARANCES:

James H. Banks and Nina M. Najjar, Dublin, Ohio, for appellant.

Mark E. Kuhn, SCIOTO COUNTY PROSECUTOR, Portsmouth, Ohio, for appellee.

Harsha, J.

{¶1} A Scioto County jury convicted John M. Adams of one count of murder, one count of aggravated burglary, and two counts of kidnapping, all with firearm specifications. These charges stemmed from an incident in which Adams purportedly shot and killed Bobby Burns, the husband of Michelle Burns, his former psychiatric patient. After secretly entering the Burns's home, Adams purportedly killed Mr. Burns, fled the scene, and forced two women at gunpoint to drive him to Kentucky.

{¶2} Initially, Adams contends that the transcript of proceedings below is so deficient and unreliable that he has been deprived of his constitutional right to an effective appeal. However, the specific errors, omissions, and irregularities Adams discovered in earlier versions of the transcript were corrected after we remanded this case to the trial court under App.R. 9. Although the trial court acknowledged that the

final trial transcript might still omit proceedings that occurred outside of the jury's hearing, Adams failed to demonstrate that material prejudice resulted from the failure to properly record these proceedings.[1]

{¶3} Next, Adams argues that the trial court erred by quashing a subpoena duces tecum directing the custodian of records for Marshall University in Huntington, West Virginia to testify on his behalf and bring any records related to Mrs. Burns. However, Adams failed to follow the proper procedure to secure the attendance of an out of state witness under West Virginia Code §62-6A-2 and R.C. 2939.27. Therefore, the trial court properly granted the university's motion to quash.

{¶4} Adams also contends that the court erred by prohibiting him from cross-examining Mrs. Burns regarding her diagnosed personality disorder and excluding from evidence communications between him and Mrs. Burns on the basis of physician-patient privilege. Although the statute creating the privilege contains an exception for "criminal action[s] against a physician," Adams failed to show that any excluded communication was "related to the action" as required by that provision. The trial court did arguably abuse its discretion by preventing Adams from impeaching Mrs. Burns under Evid.R. 616(B) by questioning her about the disorder's impact on her ability to observe, remember, and relate the events surrounding her husband's murder. However, any error the court committed by limiting cross-examination on this subject was harmless beyond a reasonable doubt in light of the overwhelming evidence of Adams's guilt concerning the charges Mrs. Burns testified about.

[1] We do not, however, condone the tortured efforts necessary to obtain an accurate record in this case. They almost rise to the level of being inexcusable. Likewise, both parties and both courts, including this one, are at least partially responsible for the inordinate delay in reaching a decision. Nonetheless, in light of the overwhelming evidence of Adams's guilt, nothing short of structural error, which we conclude is not present, would require reversal of his convictions.

{¶5} Next, Adams complains that the trial court erred by denying his motions for a mistrial based on the State's failure to timely provide certain discovery and failure to provide other discovery at all. However, Adams never raised many of the arguments he makes here in a motion for mistrial. Moreover, Adams fails to show that the State adversely affected his substantial rights due to its actions or inaction in the discovery process. Therefore, the trial court's decision to deny Adams's motion for a mistrial was not unreasonable, arbitrary, or unconscionable.

{¶6} Adams also argues that the trial court erred by refusing to order the State to provide him with the videotaped police interviews of Amanda Conkel, Cynthia Gray, and Mrs. Burns prior to trial. However, under Crim.R. 16(B)(1)(g) Adams was not entitled to any of the State's witness statements before trial. Instead, once the State completed its direct examination of each witness, Adams had to move the court to conduct an in camera inspection of the witness' statement.

{¶7} Next, Adams contends that the trial court erred in denying his motion to suppress evidence seized from his van. Because there is some evidence to support the trial court's conclusion that Adams voluntarily consented to the search of his vehicle, he waived the protection of the Fourth Amendment against unreasonable searches. Thus, the trial court properly overruled Adams's motion to suppress.

{¶8} Adams also complains that his conviction for aggravated burglary was against the manifest weight of the evidence because the State presented no evidence that he entered the Burns's home by force, stealth, or deception. He claims that all the evidence adduced at trial shows Mr. Burns invited him into the home. However, the State presented evidence that Adams secretly entered the Burns's back door without

their permission, i.e. by stealth. Because the jury could reasonably return a guilty verdict based on the State's version of the events, we cannot say that the jury clearly lost its way and created such a manifest miscarriage of justice that we must reverse the conviction.

{¶9} In addition, Adams claims that his convictions for kidnapping Conkel and Gray were against the manifest weight of the evidence because the State presented no evidence that he removed the women from the location he found them by force, threat, or deception. He insists they voluntarily drove him from Ohio to Kentucky. However, the State presented evidence that Adams ordered the women into Gray's vehicle at gunpoint and forced them to drive him to Kentucky, i.e. by threat. Because the jury could reasonably return a guilty verdict based on the State's version of the events, we cannot say that the jury clearly lost its way and created such a manifest miscarriage of justice that we must reverse the convictions.

{¶10} Adams also argues that the trial court erred by denying his motion for a new trial based on prosecutorial misconduct. However, he fails to show that any of the information the State purportedly withheld from him was material to his defense. Thus, we reject this argument.

{¶11} Finally, Adams contends that his sentence, which includes greater-than-minimum and consecutive prison terms, is void. Because the trial court relied on R.C. 2929.14(B) and (E)(4), which the Supreme Court of Ohio declared unconstitutional in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, we agree. Therefore we vacate Adams's sentence and remand to the trial court for resentencing.

I. Facts

{¶12} In July 2003, the Scioto County grand jury indicted Adams for one count of murder, one count of aggravated burglary, and three counts of kidnapping. All the charges had firearm specifications, and the murder charge carried a capital specification the State later dismissed. Adams pled not guilty to the charges, and the matter proceeded to a jury trial. Although several witnesses testified at length during the trial, only an abbreviated summary of the events is necessary at this point.

{¶13} The State presented evidence of the following version of events. Adams had a sexual relationship with Mrs. Burns when she was his psychiatric patient. Adams learned that the Burns were considering legal action in relation to his conduct. On July 2, 2003, he entered the back door of the Burns's home, without their knowledge and with a gun, and searched for the couple. He found them in an upstairs bathroom – Mrs. Burns was in the bathtub while Mr. Burns sat on the commode. Adams shot Mr. Burns. When Mrs. Burns tried to escape the house, Adams slammed her against a wall and threatened her with a gun. After Mrs. Burns ran to a neighbor's house, Adams fled the scene in his van. He later parked the van and proceeded on foot until he approached Gray and Conkel. Adams told the women he just shot a man and held the women at gunpoint as he instructed them to go to their vehicle. As the women drove Adams to Kentucky, he told them he was having an affair with the woman whose husband he shot. After police captured Adams, he confessed twice to them that he shot Mr. Burns.

{¶14} Adams attempted to argue at trial that Mrs. Burns shot her own husband, that Mrs. Burns's account of Adams kidnapping her was not credible, and that Gray and Conkel voluntarily drove him to Kentucky. The jury found Adams guilty on all counts

except for the charge of kidnapping Mrs. Burns. After sentencing, Adams filed this appeal.

II. Assignments of Error[2]

{¶15} Adams assigns the following errors for our review:

ASSIGNMENT OF ERROR NO. 1:

> THE TRIAL COURT ERRED IN DENYING DEFENDANT-APPELLANT ACCESS TO ALLEGED VICTIM MICHELLE BURNS'[S] MEDICAL RECORDS AND IN PROHIBITING AND/OR LIMITING EXAMINATION OF HER AS TO HER MULTIPLE PERSONALITIES AND/OR OTHER MENTAL ILLNESS. [Transcript of 7/14/04 at pp. 8-9; Order Granting Motion to Quash filed 7/16/04; Tr. at pp. 3-8 of Second Amended Jury Trial Transcript, 410, 422-423, 436-456, 649-651, 722-723]

ASSIGNMENT OF ERROR NO. 2:

> THE DEFENDANT WAS DENIED DUE PROCESS BY THE STATE'S FAILURE TO PROVIDE TIMELY DISCOVERY AND FAILURE TO PROVIDE EVIDENCE FAVORABLE TO THE ACCUSED SUCH THAT THE CHARGES AGAINST HIM SHOULD HAVE BEEN DISMISSED. [Transcript of 7/9/04 at p. 19; Transcript of 7/14/04 at pp. 33-34; Entry filed 7/16/04; * * * Tr. at p. 351; Tr. at pp. 534-544; Tr. at pp. 696-720]

ASSIGNMENT OF ERROR NO. 3:

> THE TRIAL COURT ERRED IN REFUSING TO REQUIRE DISCLOSURE OF THE ALLEGED VICTIMS' STATEMENTS PRIOR TO TRIAL AND REFUSING TO GRANT A MISTRIAL WHEN THE VIDEOTAPE OF MICHELLE BURNS'[S] STATEMENT WAS "FOUND" FOR THE FIRST TIME DURING TRIAL. [Tr. with manual 8/29/03 date at pp. 53-57; Judgment Entry of 9/11/03; Tr. at pp. 696-720]

ASSIGNMENT OF ERROR NO. 4:

> THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT IN THE ADMISSION OF EVIDENCE SEIZED FROM HIS VAN WITHOUT A WARRANT. [Appellant is unable to expound on this error due to the incompleteness of the transcript.]

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[2] Adams raised the first six assignments of error in 04CA2959, the seventh assignment of error in 04CA2959 and 05CA2986, and the eighth assignment of error in 05CA2986. We sua sponte consolidated these cases.

ASSIGNMENT OF ERROR NO. 5:

> DEFENDANT'S CONVICTION IS MANIFESTLY AGAINST THE WEIGHT OF THE EVIDENCE AND MUST BE OVERTURNED. [Transcript marked "July 19, 2004" at pp. 6-9; Judgment Entry filed 7/28/04]

ASSIGNMENT OF ERROR NO. 6:

> THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT. [Transcript marked "July 19, 2004" at pp. 6-9; Judgment Entry filed 7/28/04 at pp. 4-7]

ASSIGNMENT OF ERROR NO. 7:

> THE FAILURE OF THE COURT REPORTER TO PROVIDE A COMPLETE AND ACCURATE TRANSCRIPT OF PROCEEDINGS BELOW IN PROSECUTION OF MURDER AND KIDNAPPING CHARGES LENDS SUCH SUSPICION OF IRREGULARITY IN THE TRANSCRIPTION AS TO REQUIRE REMAND FOR A NEW TRIAL WITH A NEUTRAL COURT REPORTER.

ASSIGNMENT OF ERROR NO. 8:

> THE TRIAL COURT ERRED IN REFUSING TO GRANT DEFENDANT A JUDGMENT OF ACQUITTAL AND/OR A NEW TRIAL BASED UPON POLICE/PROSECUTORIAL MISCONDUCT. [Judgment Entry filed 12/30/04]

For ease of analysis, we will address Adams's assignments of error out of order.

III. Accuracy of the Transcript

{¶16} Crim.R. 22 provides that, in serious offense cases, "all proceedings shall be recorded." Because a serious offense includes "any felony" and the State charged Adams with committing numerous felonies, the court had a duty to record proceedings in this case. See Crim.R. 2(C). However, the appellant has the duty to provide a transcript for appellate review. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199, 400 N.E.2d 384 (per curiam). "This is necessarily so because an appellant bears the burden of showing error by reference to matters in the record." Id., citing

State v. Skaggs (1978), 53 Ohio St.2d 162, 372 N.E.2d 1355; see, also, App.R. 9(B). "When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court's proceedings, and affirm." *Knapp* at 199. However, if a transcript is incomplete or inaccurate, the Appellate Rules provide the appellant with several methods to correct, modify, or supplement the record on appeal. See App.R. 9(C)-(E).

{¶17} The parties, the trial court, and this court have made numerous efforts to correct the record in this case, as outlined in the Appendix to this opinion. However, in his seventh assignment of error, Adams contends that the transcription in this case has been so wrought with errors, omissions, and irregularities that we cannot conclude that the final version of the transcript accurately reflects the proceedings below. The State argues that Adams has neglected his duty to correct the record under App.R. 9 and has failed to demonstrate how any matter that may have been omitted from the transcript prejudices his appeal.

{¶18} As Adams notes, the trial court acknowledged that the final trial transcript may omit statements made outside the presence of the jury. However, we will not reverse a conviction and sentence on the grounds of some unrecorded bench and chambers conferences, off-the-record discussions, or other unrecorded proceedings where the defendant fails to show that: "(1) a request was made at trial that the conferences be recorded or that objections were made to the failures to record, (2) an effort was made on appeal to comply with App.R. 9 and to reconstruct what occurred or to establish its importance, and (3) material prejudice resulted from the failure to record

the proceedings at issue." *State v. Palmer* , 80 Ohio St.3d 543, 554, 1997-Ohio-312, 687 N.E.2d 685.

{¶19} Adams filed a motion asking the trial court to record all proceedings. However, the court did not grant this motion. Instead, the court instructed him to make a specific request for recording when he wanted a particular proceeding preserved for the record. Even if we were to presume that Adams later requested the recordation of each proceeding and made sufficient efforts to comply with App.R. 9, he failed to demonstrate that material prejudice resulted from the failure to record the proceedings at issue.

{¶20} The specific errors, omissions, and irregularities Adams complains of have been resolved through the course of our remands to the trial court. The final trial transcript now includes (1) a pre-trial discussion regarding Mrs. Burns's medical records and a motion to dismiss Adams filed; (2) an in chambers discussion with a potential juror; (3) a motion for a mistrial omitted from previous versions of the transcript; (4) a transcription of all audio and video recordings played for the jury; and (5) all proceedings that were inexplicably omitted between different versions of the transcript. If Adams wanted to supplement his brief to, for instance, assign as error the trial court's denial of the previously omitted motion for a mistrial, he had ample time to request our permission to do so but did not.

{¶21} In addition, Adams makes much of the fact that the court reporter added a sentence to the third version of the trial transcript that arguably changed the meaning of one of the court's statements during a bench conference. However, the final transcript includes this additional sentence. More importantly, Adams fails to show how the

correction of this error prejudiced his appeal.

{¶22} Adams also argues that the record does not include the transcript for a hearing on a motion to suppress evidence seized from his van. However, the trial court determined that this hearing never occurred. Moreover, as we will discuss in Section VII of this opinion, the trial court properly denied the motion.

{¶23} In addition, Adams complains about the court reporter's methodology for preparing earlier versions of the transcript. For one version of the trial transcript, the court reporter asked the trial judge to listen to the bench conference recordings and tell her what he heard. Apparently unbeknownst to the trial judge, in instances where she could not discern discussions on the recordings, the court reporter transcribed what the trial judge told her he heard. The trial judge indicated that he thought this practice might be improper. The court reporter also failed to indicate where proceedings were inaudible to her; she thought this was a "judgment call." However, when the trial court instructed the court reporter to prepare the final version of the trial transcript, it ordered her to only transcribe what she heard on the recordings and to indicate on the transcript where she found the recordings to be inaudible. Furthermore, Adams fails to explain with any specificity how the court reporter's actions prejudiced him.

{¶24} Adams generally claims that in light of the problems found in the court reporter's earlier transcriptions of bench conferences and other proceedings that occurred outside the jury's hearing, we simply cannot trust the final version of the transcript, including the transcription of events that occurred in front of the jury. Adams vaguely asserts his belief that "other substantial, relevant and necessary portions of the record * * * remain missing and unretrievable at this point." However, it is well

established that a reviewing court will not presume prejudice. *State v. Freeman*, 20 Ohio St.3d 55, 57, 485 N.E.2d 1043, citing *State v. Stanton* (1968), 15 Ohio St.2d 215, 239 N.E.2d 92, at paragraph two of the syllabus. Mere speculation will not suffice to demonstrate error. Through the course of this appeal, Adams never found a specific instance where the court reporter failed to accurately record proceedings in front of the jury.[3] Moreover, Adams does not point to any error, omission, or irregularity in the transcription of matters that occurred outside the jury's presence that has not been corrected under App.R. 9. Therefore, we reject this argument.

{¶25} Finally, we note that in Adams's May 2006 "supplemental brief," he makes a conclusory statement that "the delay in receiving even the inaccurate transcripts has violated [his] constitutional right to due process[,]" followed by a single citation to a case from the United States Court of Appeals for the Ninth Circuit. Because Adams did not separately assign this as error or provide any supporting analysis for his contention, we reject it summarily under the provisions of App.R. 12(A)(2) and App.R. 16(A)(7). Accordingly, we overrule Adams's seventh assignment of error.

IV. Motion to Quash and the Right of Cross-Examination

{¶26} In his first assignment of error, Adams contends that the trial court erred by (1) granting a motion to quash a subpoena duces tecum requesting Mrs. Burns's medical records; and (2) limiting his cross-examination of Mrs. Burns on the basis of physician-patient privilege. Although Adams again failed to separately assign and brief each purported error, he did provide reasons in support of his contentions with citations to the authorities and statutes on which he relies. Therefore, in the interest of justice,

[3] The only caveat that might be argued is the fact that certain recordings of witness statements, Adams's confession, and a conversation between Adams and Mrs. Burns that were played for the jury were not originally transcribed. That omission has been corrected.

we will address both arguments.

A. Motion to Quash

{¶27} Generally, we review a trial court's decision to quash a subpoena under an abuse of discretion standard. *State v. Riffle*, Pickaway App. No. 00CA041, 2001-Ohio-2415, 2001 WL 273202, at *3. "The term 'abuse of discretion' connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144. However, if the trial court's decision involves a specific construction of law we will review that decision de novo. See *Riffle* at *3, citing *Petro v. N. Coast Villas Ltd.* (2000), 136 Ohio App.3d 93, 735 N.E.2d 985.

{¶28} Here, Adams filed a preacipe for a subpoena asking the Scioto County Clerk of Courts to issue a subpoena duces tecum commanding the custodian of records for Marshall University's Department of Psychiatry and Behavioral Science located in Huntington, Cable County, West Virginia, to testify on his behalf and bring:

> All documents or records of any kind related to former patient of Dr. John Adams, Michelle A. Burns (1527 Mound Street, Portsmouth, Ohio) including but not limited to medical records, history, reports, physician notes, nursing notes, correspondence, etc.

The university filed a motion to quash the subpoena after it was apparently served in Huntington on one of its employees. The trial court granted the motion, finding that it did not gain jurisdiction over the university through the purported service of a subpoena served outside the state on a nonresident.

{¶29} Adams argues that the subpoena was properly served under Crim.R. 17. However, this rule provides no authority for the clerk of courts to issue a subpoena outside the state. Crim.R. 17(F) specifically provides that "[a] subpoena requiring the

attendance of a witness at a hearing or trial may be served at any place *within this state*." (Emphasis added). Therefore, we reject this argument.

{¶30} Adams also contends that the subpoena was properly served under the Uniform Act to Secure the Attendance of Witnesses from without a State in Criminal Proceedings, which Ohio and West Virginia have adopted essentially verbatim. West Virginia Code §62-6A-2 provides:

> If a judge of a court of record in any state which by its laws has made provision for commanding persons within that state to attend and testify in this state certifies under the seal of such court that there is a criminal prosecution pending in such court, or that a grand jury investigation has commenced or is about to commence, that a person being within this state is a material witness in such prosecution, or grand jury investigation, and that his presence will be required for a specified number of days, upon presentation of such certificate to any judge of a court of record in the county in which such person is, such judge shall fix a time and place for a hearing, and shall make an order directing the witness to appear at a time and place certain for the hearing.
>
> If at a hearing the judge determines that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in the prosecution or a grand jury investigation in the other state, and that the laws of the state in which the prosecution is pending, or grand jury investigation has commenced or is about to commence (and of any other state through which the witness may be required to pass by ordinary course of travel), will give to him protection from arrest and the service of civil and criminal process, he shall issue a summons, with a copy of the certificate attached, directing the witness to attend and testify in the court where the prosecution is pending, or where a grand jury investigation has commenced or is about to commence at a time and place specified in the summons. In any such hearing the certificate shall be prima facie evidence of all the facts stated therein.
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> * * *

{¶31} Because Ohio has made provision for commanding persons within it to attend and testify in West Virginia, see R.C. 2939.26, West Virginia Code §62-6A-2 applies in this case. Thus, to compel the records custodian from Marshall University to

appear with Mrs. Burns's records, the trial court had to first certify, under seal, that the custodian of records was a material witness and that his or her presence was required for a specified number of days. See R.C. 2939.27. Then the West Virginia court had to make the findings required by West Virginia Code §62-6A-2 before the witness could be ordered to testify in Ohio.

{¶32} Adams never asked the trial court to make this certification. Instead, he utilized an improper procedure by asking the Scioto County Clerk of Courts to serve the subpoena duces tecum without seeking a certification from the trial court or the approval of a court in Cabell County, West Virginia. Therefore, the trial court properly granted the university's motion to quash.

B. Right of Cross-Examination

{¶33} After being subpoenaed to testify at trial, Mrs. Burns asserted the physician-patient privilege through private counsel to prevent Adams from revealing details of her treatment with him. The court allowed Adams to elicit testimony from Mrs. Burns that he diagnosed her with multiple personality disorder but otherwise prevented him from cross-examining her on this topic. Adams contends that the trial court erred by (1) excluding from evidence purported email communications between him and Mrs. Burns; (2) refusing to let him cross-examine Mrs. Burns regarding these emails and other communications between them; and (3) prohibiting him from impeaching Mrs. Burns by questioning her about whether the diagnosed personality disorder constituted a defect of capacity, ability, or opportunity to observe, remember, or relate under Evid.R. 616(B).

{¶34} We review the trial court's decision to limit the extent of cross-examination

for an abuse of discretion. *State v. Brinkley*, 105 Ohio St.3d 231, 2005-Ohio-1507, 824 N.E.2d 959, at ¶109, citing *State v. Green* (1993), 66 Ohio St.3d 141, 147, 609 N.E.2d 1253. "The term 'abuse of discretion' connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Adams*, supra, at 157. However, the initial question of the existence of a privilege presents a question of law we review de novo. See *Wooten v. Westfield Ins. Co.*, 181 Ohio App.3d 59, 2009-Ohio-494, 907 N.E.2d 1219, at ¶12.

{¶35} Adams contends that physician-patient privilege does not apply because (1) the emails themselves were not communications related to medical treatment but were "correspondence between two adults in a consensual relationship"; (2) even if the emails and any other communications between him and Mrs. Burns were related to her treatment, Mrs. Burns waived her right to assert physician-patient privilege by, for example, filing civil lawsuits against him "alleging physical and/or mental injuries"; and (3) the physician-patient privilege does not apply in this action based on R.C. 2317.02(B)(1)(d).

{¶36} Even if we assume, without deciding, that any communications Adams sought to introduce were protected by privilege and that Mrs. Burns did not waive the privilege, we agree that R.C. 2317.02(B)(1)(d) applies to this case. On its face, that statute appears to negate the privilege "[i]n any criminal action against a physician or dentist."

{¶37} We examine questions of statutory interpretation de novo. *Covert v. Ohio Auditor of State*, Scioto App. No. 05CA3044, 2006-Ohio-2896, at ¶18. "In construing a statute, a court's paramount concern is the legislative intent in enacting the statute."

State v. S.R. (1992), 63 Ohio St.3d 590, 594, 589 N.E.2d 1319, citing *Featzka v. Millcraft Paper Co.* (1980), 62 Ohio St.2d 245, 247, 405 N.E.2d 264. To determine the legislature's intent, we must first look to the plain language of the statute itself. *State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606, 861 N.E.2d 512, at ¶9, citing *State ex rel. Burrows v. Indus. Comm.*, 78 Ohio St.3d 78, 81, 1997-Ohio-310, 676 N.E.2d 519. We must read words and phrases in context and construe them "according to the rules of grammar and common usage." R.C. 1.42. "Courts do not have the authority to ignore the plain and unambiguous language of a statute under the guise of statutory interpretation, but must give effect to the words used." *State, Dept. of Taxation v. Johnson* (Dec. 23, 1997), Jackson App. No. 96CA793, 1997 WL 799488, at *2, citing *Wray v. Wymer* (1991), 77 Ohio App.3d 122, 601 N.E.2d 503. "In other words, courts may not delete words used or insert words not used." Id., citing *Cline v. Ohio Bur. of Motor Vehicles* (1991), 61 Ohio St.3d 93, 97, 573 N.E.2d 77.

{¶38} R.C. 2317.02 provides:

> The following persons shall not testify in certain respects:
>
> * * *
>
> (B)(1) A physician or a dentist concerning *a communication* made to the physician or dentist by a patient in that relation or the physician's or dentist's advice to a patient, except as otherwise provided in this division, division (B)(2), and division (B)(3) of this section, and except that, if the patient is deemed by section 2151.421 of the Revised Code to have waived any testimonial privilege under this division, the physician may be compelled to testify on the same subject.
>
> *The testimonial privilege established under this division does not apply*, and a physician or dentist may testify or may be compelled to testify, *in any of the following circumstances*:
>
> * * *

> (d) *In any criminal action against a physician or dentist. In such an action, the testimonial privilege established under this division does not prohibit the admission into evidence, in accordance with the Rules of Evidence, of a patient's medical or dental records or other communications between a patient and the physician or dentist that are related to the action and obtained by subpoena, search warrant, or other lawful means.* A court that permits or compels a physician or dentist to testify in such an action or permits the introduction into evidence of patient records or other communications in such an action shall require that appropriate measures be taken to ensure that the confidentiality of any patient named or otherwise identified in the records is maintained. Measures to ensure confidentiality that may be taken by the court include sealing its records or deleting specific information from its records.

(Emphasis added).

{¶39} Here, the trial court felt the legislature did not intend for this provision to apply under the circumstances of this case. However, the language of the statute is clear and unambiguous that it applies "[i]n *any* criminal action against a physician." (Emphasis added). Therefore, the privilege did not prohibit the admission into evidence, in accordance with the Rules of Evidence, Mrs. Burns's communications with Adams that were related to the action and obtained by lawful means.

{¶40} Adams claims his communications with Mrs. Burns are "related to the action," and thus admissible under the statute, because (1) they implicate her as the murderer by showing Adams's confession was contrived in order to protect her from a possible suicide attempt, and (2) they cast doubt on her ability to accurately view and relate the circumstances surrounding her husband's murder. However, the only communications Adams proffered for the record were over 40 emails purportedly exchanged between him and Mrs. Burns. Adams makes no effort to analyze these emails or explain how their contents relate to this case, particularly in light of the fact that the last message was sent in January 2002 and the majority of the messages were

sent in 1999 and 2000 – several years before the July 2003 murder. Therefore, Adams failed to satisfy the statute's relevancy requirement.

{¶41} However, Adams also claims that the trial court abused its discretion by prohibiting him from impeaching Mrs. Burns under Evid.R. 616(B), which provides: "A defect of capacity, ability, or opportunity to observe, remember, or relate may be shown to impeach the witness either by examination of the witness or by extrinsic evidence." Impeaching Mrs. Adams under this rule would not necessarily depend on any communications between her and Adams. Given the fact that Mrs. Burns was the sole witness to the murder, the trial court arguably abused its discretion by refusing to let Adams inquire about her ability to observe, remember, or relate information in light of her diagnosed personality disorder. However, the record indicates that defense counsel thoroughly questioned Mrs. Burns on inconsistencies in her account of the events surrounding the murder. As Adams points out in his brief, "the jury was skeptical of [her] version of the facts" given the fact that it found Adams not guilty of kidnapping Mrs. Burns.

{¶42} Moreover, we find any error in the court's limitation of Adams's ability to cross-examine Mrs. Burns regarding her mental condition harmless beyond a reasonable doubt in light of the overwhelming evidence of his guilt on the aggravated burglary and murder charges Mrs. Burns testified about. See Crim.R. 52(A) (stating that harmless errors "shall be disregarded"); see, also, *State v. Williams* (1983), 6 Ohio St.3d 281, 286, 452 N.E.2d 1323. Adams admitted that he secretly entered the back door of the Burns's home with a gun. On five separate occasions he admitted to killing Mr. Burns: twice to police – one time was recorded by audio and video tape played for

the jury; once to the kidnapping victims, Conkel and Gray; once to fellow inmate Keith Baranski; and once in front of fellow inmate Michael Flannery.

{¶43} In addition, when police apprehended Adams, he had possession of a Taurus Model 85 .38 special caliber revolver he purchased. Heather Zollman, a forensic scientist, testified that she compared the bullets found in the Burns's home and in Mr. Burns's body with test bullets fired from the Taurus revolver and found that they could have been fired from the weapon. Moreover, police found: (1) unfired cartridges in Adams's van and on his person; (2) a pillow in his van with a bullet hole in it, giving the appearance someone had test fired a shot into it; and (3) a copy of a letter in his van addressed to University Physicians and Surgeons, Inc., an apparent employer of Adams, which indicated that the Burns might take legal action in relation to psychiatric, physical and emotional trauma Adams caused them.

{¶44} Because the prosecution overwhelmingly established the elements of the crimes of aggravated burglary and murder, any error the trial court made in limiting Adams's ability to explore Mrs. Burns's mental condition on cross-examination was harmless. Accordingly, we overrule Adams's first assignment of error.

V. Motions for a Mistrial

{¶45} In his second assignment of error, Adams contends that the court erred by denying his motions for a mistrial based on the State's failure to timely provide certain discovery and failure to provide other discovery at all. The grant or denial of a motion for mistrial rests within the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173, 182, 510 N.E.2d 343. In a criminal proceeding, the trial court should not order a mistrial merely because of some intervening error or irregularity unless the

substantial rights of the accused are adversely affected. *State v. Nichols* (1993), 85 Ohio App.3d 65, 69, 619 N.E.2d 80. This determination is also within the sound discretion of the trial court. Id. To constitute an abuse of discretion, the trial court's decision must be unreasonable, arbitrary, or unconscionable. *Adams*, supra, at 157.

{¶46} Crim.R. 16 outlines rules for discovery in criminal cases. Upon motion of the defendant, the prosecutor must provide the defendant with certain information, such as "all evidence, known or which may become known to the prosecuting attorney, favorable to the defendant and material either to guilt or punishment." Crim.R. 16(B)(1)(f). The parties have a continuing duty to promptly disclose additional matters which would have been subject to discovery or inspection under the original discovery request or order. Crim.R. 16(D). If a party fails to comply with Crim.R. 16 or an order issued under it, "the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances." Crim.R. 16(E)(3).

{¶47} Adams makes numerous complaints in his brief about discovery he claims the State provided in an untimely fashion or failed to provide at all. While he appears to have raised each of these individual complaints at some point during the proceedings in his numerous motions to compel discovery, motions to dismiss, and motions for mistrial, he cites no portion of the record where he actually raised all of his complaints in a motion for mistrial. From our review of the record, Adams did not make the following complaints in his motions for mistrial: (1) the State delayed in allowing him to inspect the gun police seized from Adams and the gun shot residue kit from Mrs. Burns's

hands; (2) the State withheld from him a list of items taken from the crime scene, recorded statements by Conkel and Gray, and 101 documents used by the Shawnee Forensic Center in preparing a report finding Adams competent to stand trial.

{¶48} Even if Adams had properly raised these issues in a motion for mistrial, he fails to explain how these purported actions by the State affected his substantial rights. For example, he had a gun shot residue expert testify at trial regarding Mrs. Burns's kit, and he stipulated to the admission of the forensic center's report, without the 101 documents, into evidence at the competency hearing. Moreover, as we will discuss in Section VI, Adams was not entitled to the recorded statements by Conkel and Gray before trial. Instead, he had to wait until they testified and ask the court to perform an in camera inspection of their statements for inconsistencies.

{¶49} The only specific issues Adams raised in his motions for mistrial, which are also raised in his brief, are that: (1) the State withheld an email sent to the mayor of Portsmouth, Ohio regarding the case; (2) the State delayed in permitting him to inspect various computers seized from the Burns's home and Mr. Burns's workplace; (3) he was unaware of Mrs. Burns's videotaped interview with police until after she testified.

{¶50} At a hearing outside the jury's presence, James Tuggle, former assistant to the mayor of Portsmouth, testified that the day after Mr. Burns's murder, an anonymous author sent the mayor an email that said "fry Bob's killer and his wife was involved." Detective James Charles testified that Tuggle gave him a copy of the email, but he gave it back to Tuggle because it was anonymous and Charles could not prove who sent it. Adams complains that he should have received a copy of the email because it constituted exculpatory evidence implicating Mrs. Burns as the murderer.

However, the email did not implicate Mrs. Burns as the murderer. If anything, it implies that Mrs. Burns did not shoot her husband but was otherwise involved in his death. The email clearly constitutes inadmissible hearsay. Moreover, Adams fails to explain how an anonymous email could have led him to admissible evidence. Furthermore, Tuggle testified that he told Eric Wrage, Adams's former attorney, about the email several months before trial while he still represented Adams, and Adams waited to pursue the issue until trial. Therefore, we fail to see how the State violated the discovery rules by not providing a copy of this email.

{¶51} Adams also complains that the State delayed in permitting him to inspect computers police seized, and he speculates that this delay caused him to lose exculpatory evidence in the form of email activity. The police seized a Dell laptop from Mr. Burns's workplace, an HP computer from the Burns's home, and a Sony Vaio from the Burns's home. William Chestnut, Adams's own computer expert, testified that he thought the laptop never contained any information of interest to this case. He further testified that some information had been deleted from the HP but whatever was deleted was not email traffic between Adams and Mrs. Burns. Because Adams did not learn of the Sony Vaio until after the trial began, the court continued the trial to let Chestnut and the State's computer expert work together to check the computer for exculpatory evidence. As no emails or other information from this computer were introduced into evidence, we can only presume none existed. Adams failed to show that any of these computers ever contained exculpatory evidence. Therefore, Adams again fails to show that the State violated the discovery rules.

{¶52} Adams complains that he did not learn of a videotaped police interview of

Mrs. Burns until after she testified. As we will discuss in Section VI, the State had no obligation to turn this tape over to Adams before trial. Although Adams did not learn of the tape's existence until after he cross-examined Mrs. Burns, the State indicated it had no objection to Adams recalling Mrs. Burns or playing the tape in its entirety for the jury. Adams opted to play the tape for the jury. Therefore, we fail to see how Adams's substantial rights were affected by this belated disclosure.

{¶53} Finally, Adams speculates throughout his argument for this assignment of error that based on the State's conduct in other discovery matters, we must presume the State has been withholding "other exculpatory evidence" from him, prejudicing his defense. But again, it is well established that a reviewing court will not presume prejudice. *Freeman*, supra, at 57, citing *Stanton*, supra, at paragraph two of the syllabus. Mere speculation will not suffice to demonstrate error. Accordingly, the trial court did not err in rejecting Adams's motion for a mistrial. We overrule his second assignment of error.

VI. Production of Witness Statements

{¶54} In his third assignment of error, Adams complains that the trial court erred by refusing to order the State to provide him with the videotaped police interviews of Conkel, Gray, and Mrs. Burns prior to trial.[4] Adams attempts to argue that the statements were "public records" and should have been disclosed under R.C. 149.43. However, "[i]n [a] criminal proceeding itself, a defendant may use only Crim.R. 16 to obtain discovery." *State ex rel. Steckman v. Jackson* (1994), 70 Ohio St.3d 420, 639

[4] In addition, Adams complains that the court erred in limiting his cross-examination of Mrs. Burns and by refusing to order a mistrial when Mrs. Burns's videotaped interview with the police surfaced after he cross-examined her. However, we already addressed these arguments in Sections IV.B and V of this opinion, respectively.

N.E.2d 83, at paragraph two of the syllabus.

{¶55} Crim.R. 16(B)(1) provides:

> *Information subject to disclosure.* * * * (g) In camera inspection of witness' statement. Upon completion of a witness' direct examination at trial, the court on motion of the defendant shall conduct an in camera inspection of the witness' written or recorded statement with the defense attorney and prosecuting attorney present and participating, to determine the existence of inconsistencies, if any, between the testimony of such witness and the prior statement.
>
> * * *

{¶56} Under the plain language of this rule, Adams was not entitled to any witness statement before trial. Instead, once the State completed its direct examination of the each witness, Adams had to move the court to conduct an in camera inspection of the witness' statement in his counsel's presence and with his counsel's participation. Accordingly, we overrule his third assignment of error.

VII. Motion to Suppress

A. Standard of Review

{¶57} Our review of a trial court's decision on a motion to suppress presents a mixed question of law and fact. *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, 850 N.E.2d 1168, at ¶100, citing *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, at ¶8. When considering a motion to suppress, the trial court acts as the trier of fact and is in the best position to resolve factual questions and evaluate witness credibility. Id. Accordingly, we defer to the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Landrum* (2000), 137 Ohio App.3d 718, 722, 739 N.E.2d 1159. Accepting those facts as true, we must independently determine whether the trial court reached the correct legal conclusion in analyzing the facts of the case. *Roberts* at ¶100, citing *Burnside* at ¶8.

B. Voluntariness of Consent

{¶58} In his fourth assignment of error, Adams argues that the trial court erred by denying his motion to suppress the evidence police seized from his van. The parties agree that police did not obtain a search warrant before searching the van. However, the trial court concluded that Adams voluntarily consented to the search.[5]

{¶59} As we explained in *State v. Fry*, Jackson App. No. 03CA26, 2004-Ohio-5747, at ¶¶18-24:

> No Fourth Amendment violation occurs when an individual voluntarily consents to a search. See *United States v. Drayton* (2002), 536 U.S. 194, 207, 122 S.Ct. 2105, 153 L.Ed.2d 242 (stating that "[p]olice officers act in full accord with the law when they ask citizens for consent"); *Schneckloth v. Bustamonte* (1973), 412 U.S. 218, 219, 93 S.Ct. 2041, 36 L.Ed.2d 854 ("[A] search conducted pursuant to a valid consent is constitutionally permissible"); *State v. Comen* (1990), 50 Ohio St.3d 206, 211, 553 N.E.2d 640. Consent to a search is "a decision by a citizen not to assert Fourth Amendment rights." Katz, Ohio Arrest, Search and Seizure (2004 Ed.), Section 17:1, at 341. In *Schneckloth*, the United States Supreme Court acknowledged the importance of consent searches in police investigations, noting that "a valid consent may be the only means of obtaining important and reliable evidence" to apprehend a criminal. Id. at 227-228.
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> * * *
>
> The state has the burden of proving, by "clear and positive" evidence, not only that the necessary consent was obtained, but that it was freely and voluntarily given. *Florida v. Royer* (1983), 460 U.S. 491, 497, 103 S.Ct. 1319, 75 L.Ed.2d 229; *Bumper v. North Carolina* (1968), 391 U.S. 543, 548, 88 S.Ct. 1788, 20 L.Ed.2d 797; *State v. Posey* (1988), 40 Ohio St.3d 420, 427, 534 N.E.2d 61. "Clear and positive evidence" is the equivalent of clear and convincing evidence. *State v. Danby* (1983), 11 Ohio App.3d 38, 41, 463 N.E.2d 47.
>
> Whether an individual voluntarily consented to a search is a question of fact, not a question of law. See *Ohio v. Robinette* (1996), 519

[5] On May 12, 2009, we ordered a limited remand to the trial court to determine whether it in fact held a hearing on Adams's motion to suppress the evidence seized from his van. If the court determined that it did not hold the hearing, we ordered the court to explain why or to conduct a hearing to consider the motion. The trial court found that it did not hold a hearing before trial and held the suppression hearing on July 7, 2009. The transcript of that hearing was transmitted as a supplemental record on September 17, 2009.

U.S. 33, 40, 117 S.Ct. 417, 136 L.Ed.2d 347; *Schneckloth*, 412 U.S. at 227; *Robinette*, 80 Ohio St.3d at 248-249, 685 N.E.2d 762; see, also, *State v. Southern* (Dec. 28, 2000), Ross App. No. 00CA2541. Because reviewing courts should defer to the trial court when it acts as a trier of fact, we must give proper deference to the court's finding regarding whether [the defendant] voluntarily consented to a search.

Thus, we review the court's finding that appellant voluntarily consented to the search under the weight of the evidence standard set forth in *State v. Schiebel* (1990), 55 Ohio St.3d 71, 74, 564 N.E.2d 54. Even though the state's burden of proof is "clear and convincing," this standard of review is highly deferential and the presence of only "some competent, credible evidence" to support the trial court's finding requires us to affirm it. Id. The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus. This principle applies to suppression hearings as well as to trials. See *State v. Fanning* (1982), 1 Ohio St.3d 19, 437 N.E.2d 583.

Important factors for the trial court to consider in determining whether a consent was voluntary include: (1) the suspect's custodial status and the length of the initial detention; (2) whether the consent was given in public or at a police station; (3) the presence of threats, promises, or coercive police procedures; (4) the words and conduct of the suspect; (5) the extent and level of the suspect's cooperation with the police; (6) the suspect's awareness of his right to refuse to consent and his status as a "newcomer to the law"; and (7) the suspect's education and intelligence. See *Schneckloth*, 412 U.S. at 248-249; see, also, *State v. Lattimore*, Franklin App. No. 03AP-467, 2003-Ohio-6829, at ¶14; *State v. Dettling* (1998), 130 Ohio App.3d 812, 815-816, 721 N.E.2d 449.

However, an individual's knowledge of the right to refuse consent "is not a prerequisite of a voluntary consent." *Schneckloth*, 412 U.S. at 234. Rather, it must be determined if a person felt compelled to submit to the officer's questioning in light of the police officer's superior position of authority. *Robinette*, 80 Ohio St.3d at 244-245, 685 N.E.2d 762. "The Court has rejected in specific terms the suggestion that police officers must always inform citizens of their right to refuse when seeking permission to conduct a warrantless consent search." *Drayton*, 536 U.S. at 206 (citing *Ohio v. Robinette* (1996), 519 U.S. 33, 39-40, 117 S.Ct. 417, 136 L.Ed.2d 347; *Schneckloth*, 412 U.S. at 227). While knowledge of the right to refuse consent is one factor, the state need not establish such knowledge as the sine qua non of an effective consent. *Drayton*, 536 U.S. at 206-207. "Nor do this Court's decisions suggest that even though there are no per se rules, a presumption of invalidity attaches if a citizen consented without explicit notification that he or she was free to refuse to

> cooperate. Instead, the Court has repeated that the totality of the circumstances must control, without giving extra weight to the absence of this type of warning. See, e.g., *Schneckloth*, supra; *Robinette*, supra." *Drayton*, 536 U.S. at 207.

{¶60} At the suppression hearing, Detective Chuck Crapyou testified that after his arrest, Adams was shaking and told Crapyou he needed his medication. Crapyou later learned Adams had Parkinson's disease. Crapyou asked Adams where the medication was located, and Adams said "it's in my vehicle or in my van." Crapyou told Adams they could not retrieve the medication unless they knew where the van was. Adams described the van's location and the pill bottle. Adams instructed Crapyou to retrieve the vehicle keys from his person and get his medication. When Crapyou found the van, he took photographs of it from outside the vehicle. He could see the pill bottle from outside the vehicle. Crapyou testified that he unlocked the vehicle and may have taken photographs of the pill bottle's location before disturbing the area by retrieving it. He saw various items in the vehicle, such as a letter, a key for a handgun, and ammunition. He did not touch these items. Instead, he got the bottle, locked the vehicle, and sealed it with evidence tape. Detective Charles and Officer Pat Hutchins picked up the medication on their way to see Adams. Crapyou stayed at the scene and ensured the vehicle was impounded.

{¶61} Detective Charles testified that he witnessed the conversation between Crapyou and Adams regarding the medication and later went to the van's location to retrieve the medication from Crapyou. He gave the medicine to the jail staff at the Greenup County Sheriff's Office in Kentucky where Adams was incarcerated, in accordance with the procedures there. Charles testified that Adams signed a Miranda waiver, and Charles interviewed him. During the interview, which lasted about an hour,

Charles made sure Adams had a blanket since he appeared cold. Adams appeared "very calm, didn't appear agitated." Charles testified that the interview took place in a "large area maybe like a cafeteria" which was "pretty open." It was not an area where prisoners were kept. Charles also testified that while Adams was incarcerated at the time of the interview, he did not believe Adams was physically restrained. At the end of the interview, Charles asked Adams if he would voluntarily let police search his vehicle. Adams agreed and signed a "Consent to Search" form, which Charles explained to him. Charles testified that Adams did not ask him any questions about the form.

{¶62} Adams testified that he has Parkinson's disease. He admitted that he told an officer his medication was in his van and gave the officer the keys to retrieve it. Later, officers came to see him in jail. Adams verified his signature on the "Consent to Search" form but did not recall signing it. He testified that he signed anything the officers put in front of him because he was afraid he would not get his medication if he did not. The following exchanged occurred on direct examination:

> Q: Why did you feel that you had to sign this to get your medicine, that's what I'm trying to ask you?
> A: I was afraid I wouldn't get my medicine. I don't remember just whether, what anybody told me, but to me the message you'd [sic] better sign this in order to get your medicine.
>
> Q: Now are you saying someone told you that or that's what you felt?
> A: I believe I felt that way because someone told me that.
>
> * * *
>
> Q: Who told you that?
> A: I'm not sure whether it was Detective Charles, Detective Crapyou or somebody else.

Adams also testified that he had spent 12 years in medical school, had a M.D., and was board certified in psychiatry.

{¶63} Application of the seven factors found in *Schneckloth* shows that the trial court's finding that Adams voluntarily consented to the search is not against the manifest weight of the evidence. Although Adams was incarcerated at the time he signed the "Consent to Search Form," his interview with Charles took place in a "pretty open" location there, lasted only one hour, and no evidence indicates Adams was physically restrained during the interview. Adams appeared "very calm" during the interview. Adams cooperated with police by speaking with them for an hour before signing the form and already gave them limited consent to enter his van to retrieve his medication. Charles testified that he explained the consent form to Adams, and Adams asked no questions about the form before signing it. Furthermore, Adams testified to his extensive educational background, including his receipt of a medical degree.

{¶64} The only evidence of any threat, promise, or coercive police procedure was Adams's testimony that someone told him he had to sign the consent form to get his medication. However, the court specifically found that Adams consented to the search. Thus, it must have deemed Charles's testimony that Adams voluntarily consented more credible than Adams's testimony that he did not. We will not second-guess the trial court's credibility decisions. *Fry*, supra, at ¶25. Therefore, we overrule Adams's fourth assignment of error.

VIII. Manifest Weight of the Evidence

{¶65} In his fifth assignment of error, Adams contends that his conviction for aggravated burglary and his two convictions for kidnapping were against the manifest weight of the evidence.[6] In determining whether a criminal conviction is against the

[6] Although Adams's fifth assignment of error asserts that his convictions for one count of aggravated burglary and two counts of kidnapping were against the manifest weight of the evidence, some of his

manifest weight of the evidence, an 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. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. A reviewing court "may not reverse a conviction when there is substantial evidence upon which the trial court could reasonably conclude that all elements of the offense have been proven beyond a reasonable doubt." *State v. Johnson* (1991), 58 Ohio St.3d 40, 42, 567 N.E.2d 266, citing *State v. Eskridge* (1988), 38 Ohio St.3d 56, 526 N.E.2d 304, at paragraph two of the syllabus.

{¶66} Even in acting as a thirteenth juror we must still remember that the weight to be given evidence and the credibility to be afforded testimony are issues to be determined by the trier of fact. *State v. Frazier*, 73 Ohio St.3d 323, 339, 1995-Ohio-235, 652 N.E.2d 1000, citing *State v. Grant*, 67 Ohio St.3d 465, 477, 1993-Ohio-171, 620 N.E.2d 50. The fact finder "is best able to view the witnesses and observe their demeanor, gestures, and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273. Thus, we will only interfere if the fact finder clearly lost its way and created a manifest miscarriage of justice.

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arguments reflect a "sufficiency of the evidence" claim. The relevant inquiry in reviewing such a claim 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* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, at paragraph two of the syllabus (superseded by state constitutional amendment on other grounds), following *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560. Under either a "manifest weight" or a "sufficiency of the evidence" inquiry, our conclusion is the same.

A. Aggravated Burglary

{¶67} Adams was convicted of aggravated burglary in violation of R.C. 2911.11(A)(2), which provides:

> No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply: * * * The offender has a deadly weapon or dangerous ordnance on or about the offender's person or under the offender's control.

{¶68} Adams contends his conviction was against the manifest weight of the evidence because the State presented no evidence that he entered the Burns's home by force, stealth, or deception. According to Adams's version of events, the evidence shows that he was invited into the home. Officer Shupert testified that in his police report, he wrote that Mrs. Burns told him someone came to the front door and "the victim," i.e. Mr. Burns, told the person to enter.

{¶69} Although we agree that the State presented no evidence of entry by force or deception, it did offer evidence of entry by stealth. "'Stealth' has been defined as 'any secret, sly or clandestine act to avoid discovery and to gain entrance into or to remain within a residence of another without permission.'" *State v. Harris*, Lucas App. Nos. L-06-1402 & L-06-1403, 2008-Ohio-6168, at ¶93, quoting *State v. Ward* (1993), 85 Ohio App.3d 537, 540, 620 N.E.2d 168, in turn, quoting *State v. Lane* (1976), 50 Ohio App.2d 41, 47, 361 N.E.2d 535.

{¶70} Mrs. Burns testified that on the night of the murder, she and Mr. Burns were in their upstairs bathroom. She was taking a bath while her husband sat on the commode. They normally keep their doors unlocked, and they did not hear anyone

enter the home. She testified that "[a]ll of a sudden the bathroom door kind of popped open." She thought it might be her son since she expected him home around that time, but it was Adams.

{¶71} Furthermore, in his audio and video taped confession, Adams admitted that he did not call the Burns before going to their home because he "figured [he would] be better off if [he] just surprised them[.]" He went to the home not knowing if "either one of them would be there." Adams admitted that he entered the home through the back door. When he did not find the couple downstairs, he proceeded upstairs where he opened the bathroom door and discovered them.

{¶72} As we explained in *State v. Murphy*, Ross App. No. 07CA2953, 2008-Ohio-1744, at ¶31:

> It is the trier of fact's role to determine what evidence is the most credible and convincing. The fact finder is charged with the duty of choosing between two competing versions of events, both of which are plausible and have some factual support. Our role is simply to insure the decision is based upon reason and fact. We do not second guess a decision that has some basis in these two factors, even if we might see matters differently.

{¶73} The jury chose to disbelieve Adams's version of events, which contradicts his own confession, and we will not substitute our judgment for that of the jury under these circumstances. The evidence reasonably supports the conclusion that Adams entered the Burns's home without their knowledge or permission and made his way to their upstairs bathroom quietly enough to avoid discovery until he opened the bathroom door. Mrs. Burns testified that she did know anyone else was in the home until the bathroom door popped open. Moreover, Adams admitted that he went to the home intending to surprise the couple. He entered the back door of the house, not knowing if the couple was home, searched for them downstairs and went upstairs when he did not

find them. Thus, after reviewing the entire record, we cannot say that the jury lost its way or created a manifest miscarriage of justice when it found Adams guilty of aggravated burglary.

B. Kidnapping

{¶74} Adams was convicted of two counts of kidnapping under R.C. 2905.01(A)(2), which provides:

> No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall remove another from the place where the other person is found or restrain the liberty of the other person, for any of the following purposes: * * * To facilitate the commission of any felony or flight thereafter[.]

{¶75} Adams contends his convictions were against the manifest weight of the evidence because the State introduced no evidence that he used force, threat, or deception on Conkel and Gray. Adams insists the women voluntarily drove him to Kentucky based on the fact that (1) the women walked by at least one police officer before entering Gray's vehicle with Adams; (2) Gray had a two-door vehicle, so Conkel had to push her seat up so Adams could get in the backseat; (3) he apologized for scaring them; (4) he asked to be let out in a well-lit area instead of the poorly lit area where the women tried to drop him off; and (5) the women did not report the incident to police but "simply went home."

{¶76} The fact that Adams apologized for scaring the women contradicts his claim that they willingly drove him to Kentucky. Moreover, Adams mischaracterizes much of Conkel's and Gray's testimony. Conkel and Gray testified that they had just exited Gray's vehicle and were walking to Conkel's apartment when Adams approached them. He held a gun which he pointed back and forth at the two women at waist-level.

He told them he just shot a man and that the police were looking for him. He instructed them to return to Gray's car. At one point Conkel stepped off the sidewalk and Adams grabbed her arm. Conkel testified that once they reached Gray's vehicle, Adams wanted to ride in the backseat. Gray sat in the driver's seat and Conkel sat in the front passenger seat. Because Gray had a two-door vehicle, Conkel had to move her seat up so Adams could get into the backseat. Gray testified that Adams held onto Conkel as he climbed into the vehicle. Both women indicated they passed a police officer or a police cruiser at some point during this incident but were too afraid to make contact because Adams had a gun.

{¶77} Gray testified that she asked Adams where she should drive, and he eventually told her to "just go toward Kentucky." Adams did not like the first location she suggested for dropping him off because it was too dark, so she left him at a Shell gas station in Kentucky. Conkel testified that Adams apologized for scaring them. Both women testified that they were too afraid to contact anyone at the gas station about the incident. They drove back to Ohio to the location where they first encountered Adams to find the police officer/cruiser they passed earlier in the evening. They mistakenly assumed that the police in that location were looking for Adams. Gray identified the gun, which police later seized from Adams when he was captured.

{¶78} Again, as we explained in *Murphy*, supra, at ¶31:

> It is the trier of fact's role to determine what evidence is the most credible and convincing. The fact finder is charged with the duty of choosing between two competing versions of events, both of which are plausible and have some factual support. Our role is simply to insure the decision is based upon reason and fact. We do not second guess a decision that has some basis in these two factors, even if we might see matters differently.

{¶79} The jury chose to disbelieve Adams's version of events, and we will not

substitute our judgment for that of the jury under these circumstances. The evidence reasonably supports the conclusion that Adams removed Conkel and Gray from the location he first encountered them by threat. Both women testified that Adams held them at gunpoint and made them drive him to Kentucky. The evidence also reasonably supports the conclusion that Adams used force on Gray. Both women testified that Adams grabbed Conkel's arm at one point, and Gray testified that Adams held onto Conkel while he entered the vehicle. Thus, after reviewing the entire record, we cannot say that the jury lost its way or created a manifest miscarriage of justice when it found Adams guilty of two counts of kidnapping. Accordingly, we overrule Adams's fifth assignment of error.

IX. Motion for a New Trial

{¶80} In his eighth assignment of error, Adams contends that the trial court erred in denying his motion for a new trial under Crim.R. 33(A)(2),[7] which provides: "A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights: * * * [m]isconduct of the * * * prosecuting attorney[.]" Generally, we review a court's denial of a motion for a new trial under Crim.R. 33 for an abuse of discretion. *State v. Swartz*, Meigs App. Nos. 479 & 495, 1993 WL 97727, at *3, citing *State v. Schiebel* (1990), 55 Ohio St.3d 71, 564 N.E.2d 54. "However, when the motion for a new trial alleges prosecutorial misconduct, we undertake a due process analysis to determine whether the misconduct of the prosecutor deprived the defendant

[7] Adams filed this motion as one "for acquittal and/or for new trial" pursuant to Crim.R. 29(C) and Crim.R. 33(A)(1)-(6). However, on appeal he only assigned as error the court's denial of this motion on the basis of prosecutorial misconduct, i.e. Crim.R. 33(A)(2). Furthermore, although Adams sought a new trial based in part on Crim.R. 33(A)(2), he failed to file his motion within 14 days of the verdict under Crim.R. 33(B), and he never sought a court order finding by clear and convincing evidence that he was unavoidably prevented from filing his motion within the 14-day time limit. However, the State failed to challenge Adams's motion on this basis.

of his due process right to a fair trial." Id., citing *State v. Johnston* (1988), 39 Ohio St.3d 48, 59-60, 529 N.E.2d 898. Thus, we must determine whether the prosecutor's actions amount to misconduct so egregious as to deny appellant the fundamental right to a fair trial. Id., citing *State v. Staten* (1984), 14 Ohio App.3d 78, 470 N.E.2d 249.

{¶81} In his brief, Adams repeats many of the complaints from his second assignment of error almost verbatim. However, in Section V we determined that the State's purported actions either did not violate the discovery rules or did not affect Adams's substantial rights. Therefore, we need not address them again. Instead, we will address Adams's new arguments that after trial, he discovered the prosecutor withheld certain evidence from him. Namely, Adams claims that the police knew Mr. Burns had placed a "spyware" program on the Burns's home computers to monitor Mrs. Burns's online activities and that police seized additional computers from Mr. Burns's workplace.

{¶82} Where the defendant claims the prosecutor suppressed properly discoverable, exculpatory evidence:

> [T]he usual standards for new trial are not controlling because "the fact that such evidence was available to the prosecution and not submitted to the defense places it in a different category than if it had simply been discovered from a neutral source after trial." *United States v. Kelly* (C.A.D.C.1986), 790 F.2d 130, 135, citing *United States v. Agurs* (1976), 427 U.S. 97, 111, 96 S.Ct. 2392, 2401, 49 L.Ed.2d 342. For that reason, the defense does not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal, the standard generally used to evaluate motions filed under Crim.R. 33. *United States v. Agurs*, supra.

Johnston at 60. "By withholding evidence favorable to the accused, the prosecution violates the defendant's due process right to a fair trial where the evidence is material either to guilt or punishment, irrespective of the good or bad faith of the prosecutor."

Swartz at *3, citing *Johnston*, in turn, citing *Brady v. Maryland* (1963), 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215.

{¶83} As we stated in *Swartz* at *3:

> [T]he key question is whether the suppressed evidence is "material." In *Johnston*, the Ohio Supreme Court adopted the test for materiality set out in *United States v. Bagley* (1984), 473 U.S. 667. Under *Bagley*, suppressed evidence favorable to the accused is material only if there is a reasonable probability that the result of the proceeding would have been different if that evidence had been disclosed to the defense. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Johnston*, paragraph 5 of the syllabus. The test, however, is stringent and the mere possibility that an item of undisclosed information might have helped the defense or might have affected the trial does not establish materiality. *State v. Jackson* (1991), 57 Ohio St.3d 29, 33, citing *U.S. v. Agurs* (1976), 427 U.S. 97, 109-110.

{¶84} At the hearing on Adams's motion for a new trial, Kathy Shaw, Mr. Burns's former co-worker, testified that after the murder she spoke with Chief Horner at the Portsmouth Police Department. She told him that Mr. Burns had installed a spyware program on his personal home computers. She gave Horner a code to activate the spyware program. Horner testified that he did not recall this conversation.

{¶85} Adams claims that with this code, he could have obtained exculpatory evidence from the two computers seized from the Burns's home, i.e. the HP and Sony Vaio discussed in Section V. However, Adams's own expert apparently found no information of value on these computers, and Adams fails to show how access to this purported spyware code would have revealed information his expert failed to find. Moreover, Adams only speculates that these computers had any evidentiary value. Again, it is well established that a reviewing court will not presume prejudice. *Freeman*, supra, at 57, citing *Stanton*, supra, at paragraph two of the syllabus. Mere speculation will not suffice to demonstrate error. Adams also argues that "the fact that [Mr. Burns]

was so suspicious of his wife as to install [a spyware program] clearly speaks to motive of [Mrs. Burns] for his murder[.]" Again, this is speculative at best.

{¶86} Testimony from the hearing on Adams's motion for a new trial also showed that the police seized two additional computers from Mr. Burns's workplace, which Adams only learned of after trial. Mr. Burns worked for the city of Portsmouth. The first computer at issue is a laptop used by Shaw. She testified that the police accidentally seized this laptop thinking it belonged to Mr. Burns. She told the police of the mistake and gave them Mr. Burns's laptop, i.e. the Dell laptop discussed in Section V. Adams has established no basis for concluding that Shaw's laptop may have any information of value to this case.

{¶87} The second computer at issue was a desktop computer used by Mr. Burns. Shaw testified that to her knowledge, the only information stored on this computer pertained to city business. Furthermore, in denying Adams's motion for a new trial, the court informed Adams that he could file a motion to have an expert examine the computer. The record provides no indication that Adams did so. Instead, he simply appealed the court's decision and continues to speculate that the computer contained exculpatory evidence that has been lost forever. We will not presume prejudice. *Freeman*, supra, at 57, citing *Stanton*, supra, at paragraph two of the syllabus. Again, mere speculation will not suffice to demonstrate error. Because Adams failed to show that the State withheld any material evidence, we overrule Adams's eighth assignment of error.

X. Sentencing

{¶88} In his sixth assignment of error, Adams argues that under *Blakely v.*

Washington (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 the trial court erred when it ordered him to serve greater-than-minimum sentences and ordered him to serve consecutive sentences. In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, the Supreme Court of Ohio announced the standard for appellate review of felony sentences. We must employ a two-step analysis to review sentences. First, we "must examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law." *Kalish* at ¶4. If this first prong is satisfied, we must review the trial court's decision under an abuse-of-discretion standard. Id.

{¶89} During the pendency of Adams's appeal, the Supreme Court of Ohio released its decision in *Foster*, supra. In that case, the Court found that several of Ohio's sentencing statutes, including R.C. 2929.14(B) and (E)(4), were unconstitutional to the extent they required judicial fact-finding before imposition of maximum, consecutive, or greater-than-minimum sentences. *Foster* at paragraphs one, three, and five of the syllabus. The *Foster* court severed the offending unconstitutional provisions from the statutes. Id. at paragraphs two, four, and six of the syllabus.

{¶90} The *Foster* court directed that a defendant who was sentenced under the unconstitutional and now void statutory provisions must be re-sentenced. Id. at ¶103. Under *Foster*, trial courts now "have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." Id. at paragraph seven of the syllabus. However, they must still consider R.C. 2929.11 and R.C. 2929.12 before imposing a sentence. *Kalish* at ¶13.

{¶91} The trial court imposed the following sentence on Adams. On Count 1, murder, the court sentenced Adams to a prison term of 15 years to life plus an additional three-year mandatory, consecutive term for the firearm specification. On Count 2, aggravated burglary, the court sentenced Adams to a prison term of five years. Then, the court ordered Adams to serve his sentences for Counts 1 and 2 concurrently to each other, for a total of 18 years. On Count 4, kidnapping of Conkel, the court sentenced Adams to a prison term of five years plus an additional three-year mandatory, consecutive term for the firearm specification. On Count 5, kidnapping of Gray, the court also sentenced Adams to a prison term of five years. Then, the court ordered Adams to serve his sentences for Counts 4 and 5 concurrently to each other, for a total of 8 years. The court then ordered Adams to serve his sentences for Counts 1 and 2 and for Counts 4 and 5 consecutively, for an aggregate of 26 years to life in prison.

{¶92} However, for each of the kidnapping counts (exclusive of the firearm specification), the court imposed a greater-than-minimum sentence. Under R.C. 2905.01(C), both convictions were second degree felonies because the jury found Adams released the victims in a safe place unharmed. Under R.C. 2929.14(A)(2), the minimum sentence for each count was two years but the court imposed a five year sentence for each count. The court also imposed a greater-than-minimum sentence for Adams's aggravated burglary conviction. As a first degree felony, the minimum sentence was three years but the court imposed a five year sentence. See R.C. 2911.11(B); R.C. 2929.14(A)(1).

{¶93} R.C. 2929.14(B), which the *Foster* court found unconstitutional to the

extent that it requires judicial fact-finding before the imposition of consecutive sentences, provides:

> (B) * * * [I]f the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender, the court shall impose the shortest prison term authorized for the offense pursuant to division (A) of this section, unless one or more of the following applies:
>
> * * *
>
> (2) The court finds on the record that the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crime by the offender or others.

{¶94} When the trial court sentenced Adams to greater-than-minimum sentences for his aggravated burglary and kidnapping convictions, it did not specifically cite this provision. However, at the sentencing hearing, the court found "that the victims in the kidnapping case have suffered psychological harm." The court also found that "there was a threat of physical harm to the kidnapping victims" and that "*minimum sentences would demean the seriousness* of [Adams's offenses] and *not adequately protect the public* in these cases." (Emphasis added). Thus, the court employed R.C. 2929.14(B)(2) in sentencing Adams to greater-than-minimum sentences for these crimes.

{¶95} In addition, the court ordered Adams to serve consecutive sentences for Counts 1 and 2 and Counts 4 and 5. R.C. 2929.14(E)(4), which the *Foster* court found unconstitutional to the extent that it requires judicial fact-finding before the imposition of consecutive sentences, provides:

> If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the

> seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:
>
> * * *
>
> (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶96} In its Judgment Entry, the court did not specifically cite R.C. 2929.14(E)(4). However, after citing R.C. 2929.14(E) generally, the court made the following findings, which mirror the language in subsection (E)(4): "[F]or the reasons stated on the record * * * consecutive sentences are necessary to protect the public from future crime and to punish the defendant and consecutive sentences are not disproportionate to the seriousness of the defendant's conduct and to the danger the defendant poses to the public." The court also found that Adams's "history of criminal conduct demonstrates that consecutive sentences are necessary."

{¶97} Because the trial court sentenced Adams, in part, under R.C. 2929.14(B) and 2929.14(E)(4), his sentence is clearly and convincingly contrary to law and is void. Therefore, we vacate his sentence and remand to the trial court for a new sentencing hearing. See *Foster* at ¶103. Accordingly, we sustain Adams's sixth assignment of error.

XI. Cumulative Error

{¶98} At the conclusion of his "amended" brief filed May 25, 2006, Adams argues that the cumulative effect of the trial court's errors deprived him of a fair trial. Because Adams did not separately assign this as error, we would be within our discretion to reject his argument summarily under App.R. 12(A)(2). However, we will briefly address his contention.

{¶99} "Before we consider whether 'cumulative errors' are present, we must first find that the trial court committed multiple errors." *State v. Harrington*, Scioto App. No. 05CA3038, 2006-Ohio-4388, at ¶57, citing *State v. Goff* (1998), 82 Ohio St.3d 123, 140, 694 N.E.2d 916. Because the only errors we have found are the arguable error in the court's limitation of Adams's cross-examination of Mrs. Burns, which we found harmless beyond a reasonable doubt, and the error in Adams's sentencing, the cumulative error principle is inapplicable. Thus, Adams's argument is meritless.

XII. Conclusion

{¶100} We overrule Adams's first, second, third, fourth, fifth, seventh, and eighth assignments of error. We sustain Adams's sixth assignment of error, vacate his sentence, and remand this matter for resentencing according to law and consistent with this opinion.

JUDGMENT AFFIRMED IN PART,
REVERSED IN PART,
AND CAUSE REMANDED.

APPENDIX

{¶101} The record was transmitted to this court in September 2004 without a transcript. Due to the court reporter's repeated inability to transcribe and file the transcript within allotted time limits, we granted Adams's motions to supplement the record on five occasions. After the court reporter filed the transcript in January 2005, which included the proceedings at the jury trial and four other hearings, Adams filed a sixth motion to supplement the record. He argued that the submitted transcript did not completely and accurately reflect the proceedings below. Specifically, Adams contended that the transcript omitted at least 10 pre-trial conferences and/or motion hearings and discussions at approximately 40 bench conferences that occurred during the trial. We granted his motion, and in March 2005, the court reporter filed transcripts from additional hearings and an amended transcript of the jury trial.

{¶102} While drafting his brief, Adams realized that the amended transcript of the jury trial still omitted several bench conferences. He further realized that the record did not contain the first part of a pre-trial hearing on February 26, 2004 or a transcription of the videotaped police interviews of Adams, Mrs. Burns, or Cynthia Gray played at trial. Although Adams filed his appellate brief, he also filed a seventh motion to supplement the record with these materials and requested permission to supplement his brief on receipt of the full record. We granted Adams's motion to supplement the record and ordered the court reporter to prepare and file the missing portions of the transcript by May 6, 2005. Because his brief already met this court's 35-page limit, see Loc.R. 10, we instructed Adams that once the court reporter supplemented the record, he needed to file a motion explaining why additional pages were necessary.

{¶103} The court reporter filed an affidavit stating that the amended transcript filed in March 2005 was complete and accurately reflected the proceedings held in the trial court. Adams filed a response to this affidavit, reiterating his contention that the transcript still omitted material proceedings. Adams then asked this court to clarify the status of his case. In July 2005, under App.R. 9(E) we ordered Adams to prepare a statement of the evidence in accordance with App.R. 9(C). We granted Adams three extensions to complete this statement.

{¶104} In November 2005, Adams requested a fourth extension. He noted that the court reporter had indicated her belief that she could not accurately transcribe the recordings of statements of Adams, Mrs. Burns, or Gray played for the jury. He asked that we permit an outside court reporting firm to transcribe these recordings. Alternatively, he requested a new trial based on his belief that it was impossible to accurately reconstruct the missing portions of the record, in part because Adams's counsel could not recall the substance of the missing proceedings. We denied Adams's request to release the recordings because he conceded that the outside reporting firm also could not guarantee the accuracy of its transcription. Given the parties' continued disagreement as to the completeness and accuracy of the transcript, we remanded the matter to the trial court to determine whether the record included the entire proceedings, and if it did not, to correct any omissions under App.R. 9(E).

{¶105} In February 2006, the court reporter filed a second amended transcript of the jury trial. Because the trial court did not hold a hearing on remand, the record is unclear as to any instructions the trial court gave the court reporter for preparing this transcript. In response to this filing, Adams filed a motion to supplement the record and for clarification as to how to proceed. Alternatively, he requested that we reverse his convictions and remand this matter for a new trial. Adams again argued that it was impossible to determine whether the transcript accurately reflected the proceedings. He highlighted the fact that later versions of the transcript omitted proceedings that had been included in earlier versions of the transcript. He also noted that later versions of the transcript included additional pages of proceedings despite the court reporter's previous assurances that the record was complete and accurate. After Adams filed this motion, the court reporter filed the missing portion of a February 26, 2004 pre-trial hearing. In a supplement to his motion, Adams pointed to this late filing as further support for his contentions.

{¶106} We granted in part and denied in part Adams's motion. Although we sympathized with Adams's difficulties in obtaining the record for his case, we determined that a remand for a new trial was not warranted at that point. We ordered the court reporter to file a third amended transcript of the jury trial by May 2, 2006. This transcript was to include proceedings included in earlier versions of the transcript but that were omitted from the second amended transcript. After the third amended transcript was filed, the parties amended their briefs, and Adams filed a supplemental brief addressing his continued complaints regarding the state of the transcript.

{¶107} In October 2006, we reviewed the record, which then included four different versions of the trial transcript, and found it "so confusing that we [could not] confidently say that it [was] complete or accurate as it currently [stood]." We sua sponte remanded the matter to the trial court for a mandatory evidentiary hearing consistent with App.R. 9(E) to remedy the discrepancies in the record. We noted that if the contents of the record could not be accurately ascertained or the trial court did not rectify any disputes, a new trial might be the only way to ensure that Adams could fairly and adequately argue his position on appeal.

{¶108} The trial court held the evidentiary hearing in January 2007. The court reporter testified that she believed her transcription of the proceedings in front of the jury was complete and accurate. She could hear these proceedings and take shorthand notes of them. She testified that the court's recording equipment is able to pick up these proceedings, allowing her to later compare her shorthand notes to the recordings.

{¶109} The court reporter further testified that she has difficulty hearing whispered bench conferences during trials to record them by shorthand. She normally relies on the courtroom's recording equipment to tape those conferences. Due to the poor quality of this equipment, she could not hear everything that occurred during the conferences when she tried to prepare a transcript for this case. The trial court also

indicated that the courtroom recording equipment was old.

{¶110} The court reporter attributed some of the discrepancies between the different versions of the trial transcript to her repeated efforts to listen to the recordings to pick up as much of these bench conferences as possible. She further testified that in preparing one version of the trial transcript, she asked the trial judge to listen to the bench conference recordings and tell her what he heard. Apparently unbeknownst to the trial judge, in instances where she could not discern discussions on the recordings, the court reporter transcribed what the trial judge told her he heard. At the hearing, the trial judge indicated that he thought this practice might be improper. The court reporter also testified that she did not indicate in the trial transcripts where proceedings were inaudible to her; she thought this was a "judgment call." Instead, she continued to transcribe what she could hear as if the inaudible proceedings never occurred.

{¶111} The court reporter could not testify with certainty as to why specific omissions occurred between the different versions of the transcript. She thought they might be due to her use of different sets of equipment and software at work and at home or a faulty disc. As to the recordings of statements played in front of the jury, the court reporter testified that she felt uncomfortable transcribing the tapes. She did not witness the recordation of the statements and stated her belief that such recordings are frequently of poor quality. She indicated that she expressed similar concerns to this court on prior occasions, and we approved her decision to not transcribe such tapes.[8]

{¶112} At the close of the hearing, the trial judge instructed the court reporter to prepare a fifth version of the trial transcript, paying specific attention to the bench conferences. He told her to only transcribe what she heard on the recordings of the conferences and to indicate on the transcript where she found the recordings to be inaudible. He further instructed her to correct the omissions that occurred between the different versions of the transcript. After the hearing, Adams filed a motion for remand for a new trial to which the State did not respond.

{¶113} The court reporter filed the fifth version of the trial transcript, i.e. the fourth amended version, in June 2007. The trial court issued a judgment entry in August 2008, finding that:

> From the evidence, this Court finds the trial transcript is accurate and complete. The only possible inaudible portions of the transcript would be things that were said outside the presence of the jury. This Court specifically finds that all testimony before the jury has been accurately reflected in the trial transcripts.

{¶114} On May 12, 2009, we again remanded the matter to the trial court after concluding through no fault of Adams, that the record did not include the transcripts of audio and/or video recordings played for the jury during the trial: (1) The

[8] We are unaware of the occasions to which the court reporter referred.

audio and video tape of the police interview of Adams; (2) the audio tape of a conversation between Adams and Mrs. Burns; (3) the video tape of the police interview of Gray; and (4) the video tape of the police interview of Mrs. Burns. We ordered the court reporter to transcribe these recordings within 60 days of our entry. If the court reporter was unable to transcribe the recordings, we instructed her to file a memorandum explaining in detail the reasons why. We further ordered the trial court to determine whether it in fact held a hearing on a motion to suppress Adams filed on July 13, 2004, which concerned evidence seized from his van. If the court concluded it held the hearing, it was to determine whether the hearing was recorded. If the hearing was recorded, we instructed the trial court to have the court reporter transcribe it. If the hearing was not recorded, we ordered the court to prepare a correction of the record under App.R. 9(E) or to conduct a new hearing to consider the motion. If the court concluded that it did not hold the hearing, we ordered it to explain why it did not conduct the hearing or to conduct a hearing to consider the motion.

{¶115} The court reporter transcribed all of the recordings. The trial court determined that it did not hold a hearing on the motion to suppress. Therefore, the court held a hearing on July 7, 2009 and overruled Adams's motion to suppress.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED IN PART AND REVERSED IN PART and that the CAUSE IS REMANDED. Appellant and Appellee shall split the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Kline, P.J. & Abele, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.