[Cite as *State v. Middlebrooks*, 2010-Ohio-2377.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-08-1196

Appellee — Trial Court No. CR-08-1392

v.

Cordney Middlebrooks — **DECISION AND JUDGMENT**

Appellant — Decided: May 28, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Evy M. Jarrett, Assistant Prosecuting Attorney, for appellee.

Deborah Kovac Rump, Appellant

* * * * *

SINGER, J.

{¶ 1} Appellant, Cordney Middlebrooks, appeals from a jury verdict in the Lucas County Court of Common Pleas finding him guilty of rape in violation of R.C. 2907.02(A)(2) and (B). For the reasons that follow, we affirm.

{¶ 2} Appellant was indicted for rape on February 19, 2008. A jury trial commenced on June 9, 2008. T. Harris testified that she is the aunt of the victim in this case. On February 8, 2008, the victim called Harris. She was crying and she told her aunt she had been hurt. K. Easley testified that she is the victim's cousin and that she lives in the same apartment complex as the victim. On February 8, 2008, Harris called Easley and asked her to go the victim's apartment to check on her because of the phone call she had received. Easley testified that she went to the victim's apartment and found her crying and huddled on her bathroom floor. The victim's bedroom and bathroom were in disarray in contrast to the rest of the neat and orderly apartment. The victim told Easley that her ex-boyfriend had broken into her apartment and raped her. Easley called 911.

{¶ 3} The victim testified that she had recently broken up with her boyfriend. The afternoon of February 8, appellant came to her apartment because he wanted to talk about their relationship. She allowed him to come in and they got into an argument. He ordered her to go into her bedroom and she refused. He then picked her up, took her to her bedroom and threw her on her bed. He ripped off her clothes and proceeded to sexually assault her despite her pleas to stop. When he was finished, he ordered the victim into the bathroom. She refused to go and began to hit and kick appellant. He then picked her up and took her into the bathroom. During the struggle, a clock fell from the wall and struck appellant's head. Appellant put the victim in the bathtub, turned on the shower and tried to wash her. She began fighting him again so he took a bottle of

peroxide and poured it over her. He covered her face with a portion of the shower curtain and told her that if she didn't stop fighting him "your kids are going to find you gone for real." When he was finished washing her, he told her to stay in the bathroom until he left.

{¶ 4} Kelly Michael testified that she is a registered nurse, specially trained as a sexual assault examiner. On February 8, 2008, she treated the victim in this case. During her initial interview with the victim, Michael testified that she was very upset and was crying. Based on her physical exam of the victim, Michael testified that her injuries were consistent with someone who had been sexually assaulted.

{¶ 5} Jennifer Akbar testified that she is a forensic scientist with the Ohio Bureau of Criminal Identification and Investigation ("BCI"). She testified that the sperm cells found in the victim's rape kit matched the DNA of appellant.

{¶ 6} Toledo Police Detective Harold Mosley testified that based on the victim's information, an arrest warrant was issued for appellant. He was arrested on February 11, 2008, and taken to the police station where Mosley read him his rights. Appellant waived his rights and Mosley proceeded to interrogate him. The taped interrogation was admitted into evidence. During the interrogation, appellant admitted that he went to the victim's apartment and had sex with her but he claimed the sex was consensual.

{¶ 7} On June 12, 2008, appellant was found guilty of rape. He was sentenced to eight years in prison. Appellant now appeals setting forth the following assignments of error:

{¶ 8} "I. Middlebrooks' right to confront witnesses against him was violated by the trial court's admission of a laboratory report without the testimony of the scientist who prepared it.

{¶ 9} "II. By not filing a key pretrial motion, being unprepared for trial and sentencing, and by failing to timely file a witness list, Middlebrooks did not receive his right to effective assistance of competent counsel.

{¶ 10} "III. The prosecutor engaged in misconduct, particularly when he told the jury that the defendant should have called witnesses to testify on his behalf.

{¶ 11} "IV. The trial court improperly made findings of fact, did not permit Middlebrooks to have a presentence report and otherwise abused its discretion relative to his sentence.

{¶ 12} "V. The conviction was against the manifest weight of the evidence.

{¶ 13} "VI. The trial court abused its discretion through a series of evidentiary rulings and by failing to grant Middlebrooks' request for a mistrial."

{¶ 14} Appellant's first assignment of error concerns the testimony of forensic scientist, Jennifer Akbar. Appellant contends that his Sixth Amendment right to confront witnesses against him was violated when Akbar testified regarding the contents of a lab report that was authored by another scientist who did not testify at trial.

{¶ 15} Initially, we note that appellant did not object to Akbar's testimony at trial. As such, this assignment of error may only be reviewed under a plain error analysis. *State v. Long* (1978), 53 Ohio St.2d 91, 96-97. "In order to establish plain error,

appellant must show that but for the error, the outcome of the trial clearly would have been otherwise." *State v. Herrera*, 6th Dist. No. OT-05-039, 2006-Ohio-3053. "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Long*, supra, at paragraph three of the syllabus.

{¶ 16} Akbar testified that Julie Cox, another BCI forensic scientist, examined the victim's rape kit for the presence of semen. Akbar identified state's exhibit No. 102 as a forensic biology report from the BCI. The first portion of the report indicated the presence of semen from the rape kit. The report was signed by Julie Cox. The second portion of the forensic biology report indicated that the semen from the rape kit matched appellant's DNA. Specifically, the probability of finding a similar match in the general population was one in 2,661,000,000,000,000,000. This portion of the report was signed by Akbar.

{¶ 17} In *Melendez-Diaz v. Massachusetts* (2009), 557 U.S. ____, 129 S.Ct. 2527, 174 L.Ed.2d 314, the United States Supreme Court considered whether a defendant's Sixth Amendment right of confrontation was violated when the state, attempting to prove that Melendez-Diaz had trafficked in cocaine, introduced a lab report from the state laboratory stating that the contraband seized from Melendez-Diaz was indeed cocaine. The lab reports were introduced into evidence without the testimony of the analysts who authored the reports. The state had argued that the lab reports constituted admissible hearsay as they fell under the business records exception pursuant to Fed.R.Evid. 803(6).

{¶ 18} Citing *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177, the Supreme Court held that the admission of the lab reports, absent the testimony of the analysts who performed the tests, violated a defendant's Sixth Amendment right of confrontation. In so holding, the court rationalized that the reports were testimonial because they covered the identical material that would be elicited on direct examination of the analysts who performed the tests. *Melendez-Diaz*, supra, at 2532-2534.

{¶ 19} "However, nothing in the Supreme Court's decision in *Melendez-Diaz*, speaks specifically to the admissibility of a second analyst's testimony or whether the Sixth Amendment requires testimony from the analyst who performed the original test." *State v. Lopez*, 12th Dist.No. CA2008-12-291, 2010-Ohio-732, ¶ 61. The court did explain that its decision did "* * * not mean that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case." *Melendez-Diaz*, supra, at 2532.

{¶ 20} In interpreting *Melendez-Diaz*, other courts have found that a defendant's confrontation rights are not violated when the state calls a witness other than the analyst who performed the original test. *Lopez*, supra, at ¶ 66. In *Pendergrass v. State* (Ind. 2009), 913 N.E.2d 703, the Indiana Supreme Court distinguished its case from *Melendez-Diaz*. In *Pendergrass*, a lab supervisor testified to the validity of a DNA test. The actual analyst who performed the test did not testify. The *Pendergrass* court held that this was

admissible because the supervisor played a direct part in processing the test and she had personal knowledge of standard operating procedure of the laboratory and whether the analyst diverged from these procedures. Thus, the court held that Pendergrass' right to confrontation was not violated in contrast to Melendez-Diaz's situation where no analysts involved with the certificates were available for cross examination. See, also, *Larkin v. Yates*, (C.D.Cal. 2009), _ F.Supp. _ , (Lab supervisor, who did not perform the original tests on evidence, testified regarding the results. The court rejected the defendant's *Melendez-Diaz* claim noting that the supervisor separately reviewed all of the relevant data before offering her own independent interpretation rather than simply reading a sworn affidavit into evidence.), *People v. Johnson* (2009), 394 Ill.App.3d 1027, (applying *Melendez-Diaz* to reject appellant's claim that his confrontation right was violated when the state offered DNA evidence through the testimony of an analyst who verified the results of prior testing but who had not performed the original testing.)

{¶ 21} Here, Akbar testified that it was common practice to split up their cases and that all of the scientists rely on each other's findings. For example, one forensic scientist may be the one to examine the evidence while a completely different scientist tests the evidence for DNA. Akbar testified regarding the procedures, process, logistics, and results of the DNA testing offered as evidence against appellant, focusing on the work she herself performed in getting the DNA match. The jury was well-aware that Akbar was not the one who initially detected semen from the rape kit and could therefore choose to assign whatever weight it chose to the evidence. Accordingly, we fail to find plain error. Appellant's first assignment of error is found not well-taken.

{¶ 22} In his second assignment of error, appellant contends he was denied effective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, appellant must show that counsel's conduct so undermined the proper functioning of the adversarial process that the trial court cannot be relied upon as having produced a just result. The standard requires appellant to satisfy a two-prong test. First, appellant must show that counsel's representation fell below an objective standard of reasonableness. Second, appellant must show a reasonable probability that, but for counsel's perceived errors, the results of the proceeding would have been different. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. This test is applied in the context of Ohio law that states that a properly licensed attorney is presumed competent. *State v. Hamblin* (1988), 37 Ohio St.3d 153.

{¶ 23} Appellant first contends that his counsel was ineffective because he failed to file a motion to suppress evidence.

{¶ 24} A failure to file a motion to suppress is not per se ineffective assistance of counsel. *State v. Madrigal* (2000), 87 Ohio St.3d 378, 389, 2000-Ohio-448, citing *Kimmelman v. Morrison* (1986), 477 U.S. 365, 384, 106 S.Ct. 2574. "To establish ineffective assistance of counsel for failure to file a motion to suppress, a defendant must prove that there was a basis to suppress the evidence in question." *State v. Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837, ¶ 65, citing *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, ¶ 35. Moreover, where the failure to file a motion to suppress represents a reasonable trial strategy or a "tactical judgment," a claim of ineffective assistance must fail. Id.

{¶ 25} Appellant contends that his counsel should have filed a motion to suppress to challenge any statements he made to Detective Mosley during his interview. However, the taped interview, admitted into evidence, shows Detective Mosley reading appellant his rights and appellant clearly waiving his rights. Appellant also contends a motion to suppress should have been filed to reveal what comments, if any, appellant made off camera. As we have no way of knowing what, if any comments were made, we cannot say that a motion to suppress would have succeeded on that basis.

{¶ 26} Next, appellant contends that counsel was ineffective in that he was unprepared for trial. We find no basis in the record for this contention. On the morning of June 8, 2008, appellant's counsel announced to the court that he was prepared to go to trial. Though counsel admitted that he had considered asking for a continuance due to a family emergency, he ultimately did not ask for a continuance. The record shows that counsel was well versed in the facts of the case and counsel performed thorough cross-examinations on the state's witnesses.

{¶ 27} Appellant points to counsel's closing argument as evidence he was unprepared. Specifically, counsel read from the medical records authored by the doctor who treated the victim. Counsel stressed to the jury that the victim complained of very few injuries to the doctor in contrast to her interview with Nurse Michael. Counsel also noted that the victim told the doctor that she did not lose consciousness during the attack but that she told the nurse that she had. Appellant contends that it appears counsel was unaware of this contradictory evidence during the trial and that he accidentally stumbled

across it during his closing argument. Based on the record before us, we have no way of determining how or when counsel discovered this evidence. What is important is that the medical records were admitted into the evidence and the contradictions were brought to the attention of the jury. Therefore, we cannot find counsel to be ineffective based on this argument.

{¶ 28} Appellant also contends that counsel was ineffective for failing to call witnesses to testify regarding the relationship between the victim and appellant. In particular, appellant believes that certain witnesses could establish that the victim was falsely accusing appellant because she wanted to get back with him. This argument is without merit as "[trial] counsel's decision whether to call a witness falls within the rubric of trial strategy and will not be second-guessed by a reviewing court." *State v. Mathews*, 10th Dist. No. 03AP-140, 2003-Ohio-6307 at ¶ 31, quoting *State v. Treesh* (2001), 90 Ohio St.3d 460, 489.

{¶ 29} Appellant finds fault in counsel's failure to object to the admission of Julie Cox's forensic laboratory report. Having already determined there was no error in the admission of the report, this argument is too without merit.

{¶ 30} Finally, appellant contends that counsel was ineffective in allowing appellant to waive his right to a presentence report and proceeding immediately to sentencing. We likewise reject this contention as the failure to request a presentence investigation report does not constitute ineffective assistance of counsel. *State v. Keith* (1997), 79 Ohio St.3d 514. Appellant's second assignment of error is found not well-taken.

{¶ 31} In his third assignment of error, appellant alleges prosecutorial misconduct on the part of the state. Appellant directs our attention to the closing arguments where appellant claims the prosecutor vouched for the credibility of a state witness and commented on appellant's failure to call a certain witness to the stand.

{¶ 32} It is well-settled that prosecutors are generally given a certain degree of latitude in their closing arguments. *State v. Smith* (1984), 14 Ohio St.3d 13. "The test regarding prosecutorial misconduct in closing arguments is whether the remarks were improper and, if so, whether they prejudicially affected substantial rights of the defendant." Id. at 14.

{¶ 33} Appellant objects to the prosecutor's comments regarding the victim in this case. The prosecutor stated to the jury that: "* * * you saw her demeanor on the standard[sic], she broke down, she cried, she couldn't get it together. This traumatized her. I mean, that's real. You can't fake that stuff." Appellant's counsel objected to these statements and his objection was overruled.

{¶ 34} A prosecutor may comment in closing argument on what the evidence has shown and what reasonable inferences the prosecutor believes may be drawn from it. *State v. Lott* (1990), 51 Ohio St.3d 160, 165. A prosecutor does not improperly vouch for a witness's credibility by arguing, based upon the evidence, that a witness was "a reliable witness to the simple events she witnessed, that she lacked any motive to lie, [or] that her testimony was not contradictory." *State v. Green*, 90 Ohio St.3d 352, 373-374, 2000-Ohio-182. "* * * [A] prosecutor cannot express his personal belief or opinion as to

credibility of a witness or as to the guilt of the accused, or go beyond the evidence which is before the jury * * *." *State v. Stone*, 12 Dist. No. CA2007-11-132, 2008-Ohio-5671, ¶ 27.

{¶ 35} Here, the prosecutor merely reminded the jury of what they saw when the victim took the stand and suggested that it would be difficult for her to have fabricated her emotions. The prosecutor in no way guaranteed the victim's credibility, nor did he go beyond the evidence that was presented to the jury. Accordingly, we do not find that the prosecutor's statements deprived appellant of a fair trial.

{¶ 36} Appellant also contends that the prosecutor engaged in misconduct when he stated "[they] can subpoena witnesses like we can" in reference to the fact that appellant did not call the doctor who treated the victim to the stand to support his contention that the victim was lying. The Ohio Supreme Court has held that the prosecution may comment upon the evidence and upon the failure of the defense to offer evidence in support of its case. *State v. Clemons* (1998), 82 Ohio St.3d 438, 452. Accordingly, we find no error. Appellant's third assignment of error is found not well-taken.

{¶ 37} In his fourth assignment of error, appellant contends that the court erred in sentencing appellant. First, appellant contends that the trial court engaged in improper fact finding.

{¶ 38} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the Supreme Court of Ohio severed the unconstitutional portions of R.C. Chapter 2929 that required the trial court to engage in fact finding before sentencing a defendant. After the decision, "trial

courts 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 ¶ 100. "Since *Foster*, trial courts no longer must navigate a series of criteria that dictate the sentence and ignore judicial discretion." *State v. Strickland*, 11th Dist. No. 2008-L-172**,** 2009 -Ohio- 6855, citing *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, at ¶ 25.

{¶ 39} The Supreme Court of Ohio has recently held that felony sentences are to be reviewed under a two-step process. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 26. The *Kalish* court held:

{¶ 40} "First, [appellate courts] 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. If this first prong is satisfied, the trial court's decision in imposing the term of imprisonment is reviewed under the abuse of discretion standard." Id. "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.

{¶ 41} "While specific findings are not required by trial courts under Foster, a trial court is not prohibited from stating those factors it considered when imposing a sentence." *Strickland*, supra, citing *State v. Stroud*, 7th Dist. No. 07 MA 91, 2008-Ohio-3187, ¶ 17.

{¶ 42} When sentencing appellant, the trial judge stated that she had listened to the evidence and that she believed that appellant had brutally raped the victim and had attempted to smother her with a shower curtain. The trial judge reached these conclusions based on the information she had obtained by listening to the trial testimony. The trial judge was merely relaying some of the things she took into consideration in making her sentencing determination. None of the statements were improper judicial findings of fact pursuant to the statutory sections severed in *Foster*. Further, we note that *Foster* did not take away a sentencing judge's ability to discuss the nature of the crime when sentencing a defendant.

{¶ 43} Appellant also contends that the court erred in sentencing appellant immediately after the verdict without requesting the compilation of a presentence investigation report. Appellant's argument is without merit as presentence investigation reports are discretionary when a court sentences a felony offender to a prison term. *State v. Arios*, 8th Dist. No. 91506, 2009-Ohio-5814, citing *State v. Myrick*, 8th Dist. No. 91492, 2009-Ohio-2030. Appellant's fourth assignment of error is found not well-taken.

{¶ 44} In his fifth assignment of error, appellant contends that his conviction was against the manifest weight of the evidence.

{¶ 45} The "weight of the evidence" refers to the jury's resolution of conflicting testimony. *State v. Thompkins*, 78 Ohio St.3d 380, 387. In determining whether a verdict is against the manifest weight of the evidence, the appellate court sits as the "thirteenth juror" and "* * * weighs the evidence and all reasonable inferences, considers the

credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered ." Id. An appellate court must defer to the factual findings of the jury regarding the weight to be given the evidence and credibility of the witnesses. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. When examining witness credibility, "[t]he choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *State v. Awan* (1986), 22 Ohio St.3d 120, 123. The factfinder is free to believe all, part, or none of the testimony of each witness appearing before it. *State v. Brown*, 11th Dist. No. 2002-T-0077, 2003-Ohio-7183, ¶ 53.

{¶ 46} Appellant was convicted of rape in violation of R.C. 2907.02(A)(2) and (B). The elements are as follows: "No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force. * * * Whoever violates this section is guilty of rape, a felony of the first degree."

{¶ 47} The trier of the facts, in this case the jury, chose to believe the victim who testified that on February 8, 2008, appellant forced her to engage in sexual intercourse. This is a matter of credibility within the province of the trier of facts, not for this court upon appeal. On review, we cannot say that the jury clearly lost its way or perpetrated a manifest miscarriage of justice. Accordingly, appellant's fifth assignment of error is found not well-taken.

{¶ 48} In his sixth and final assignment of error, appellant contends that the trial court committed error when making several evidentiary rulings. We review a trial court's decision to admit or exclude evidence under an abuse of discretion standard. *Krischbaum v. Dillon* (1991), 58 Ohio St.3d 58.

{¶ 49} Appellant first contends that the trial court erred in allowing K. Easley to testify that the victim changed after the incident and that she became depressed. Appellant contends that the unfair prejudice of the testimony substantially outweighed the probative value of the evidence. We disagree. The testimony is probative of the victim's credibility.

{¶ 50} Next, appellant contends the trial court erred in preventing appellant's counsel from asking Easley if she ever heard the victim claim that during the assault, appellant "dug his fingernails" into her neck. This error is harmless given the other evidence presented to show the brutality of the attack. Moreover, before the prosecutor was able to raise an objection to the questioning, Easley had testified that she did not remember whether or not the victim made the accusation.

{¶ 51} Appellant also contends that the court erred in admitting statements that the victim made hours after her attack. The statements were admitted as excited utterances.

{¶ 52} Evid.R. 803(2) defines an "excited utterance" as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." In determining whether a statement qualifies as an excited utterance, the court should consider "(1) the lapse of time between the event and

the statement, (2) the mental and physical condition of the declarant, (3) the nature of the statement, and (4) the influence of intervening circumstances." *State v. Humphries* (1992), 79 Ohio App.3d 589, 598.

{¶ 53} Evid.R. 803(2) creates a factual question as to whether the declarant is still under the stress of excitement caused by the incident when she makes her statements. The only time requirement imposed by the rule is that the statements be made without a delay which is unexplained or is inconsistent with the occurrence of the offense. The time element is not the controlling factor.

{¶ 54} Given the fact that the statements to which appellant objects were made at the hospital, merely hours after the incident, and based on the consistent testimony of other witnesses who stated that the victim was very distressed when she was at the hospital, we cannot say that the court erred in admitting the victim's statements as excited utterances.

{¶ 55} Appellant next contends that the trial court erred in admitting the testimony of Toledo Police Officer Diana Trevino and Kelly Michael. Appellant contends that the court improperly allowed their testimony as "expert" testimony.

{¶ 56} Under Evid.R. 702, a witness may testify as an expert where following applies:

{¶ 57} "(A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;

{¶ 58} "(B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

{¶ 59} "(C) The witness' testimony is based on reliable scientific, technical, or other specialized information. * * *."

{¶ 60} Officer Trevino testified that she was the first officer to arrive at the victim's apartment. She described the scene, the victim's demeanor and she told the jury what the victim had relayed to her. Though she was asked questions based on her past experience with rape victims, she was at no time introduced as an expert witness.

{¶ 61} As for Kelly Michael, we find her testimony as an expert to be admissible. She testified that she is a registered nurse specifically qualified as a sexual assault nurse examiner. To achieve this qualification, Michael attended a week long course where she learned how to identify injuries consistent with rape, how to assemble a rape kit and how to properly photograph the evidence. This knowledge is clearly beyond the knowledge of a lay person.

{¶ 62} Appellant also contends that the court erred in allowing Detective Mosely to testify that he enjoyed a 98 percent conviction rate. We find any error in the admission of this statement to be harmless giving the overwhelming evidence presented against appellant.

{¶ 63} Finally, appellant contends that the court erred in denying his motion for a mistrial based on the prosecutor's statement that "[they] can subpoena witnesses like we can." The grant or denial of a mistrial rests in the sound discretion of the trial court. *State*

v. Garner, 74 Ohio St.3d 49, 59. Having already determined that the court did not err in admitting that statement, we find no abuse of discretion.

{¶ 64} Appellant's sixth assignment of error is found not well-taken.

{¶ 65} On consideration whereof, we find that appellant was not prejudiced or prevented from having a fair trial and the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Keila D. Cosme, J. _____
CONCUR.
JUDGE