[Cite as *State v. McDonald*, 2010-Ohio-574.]

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

State of Ohio — Court of Appeals No. L-08-1032

Appellee — Trial Court No. CR-2006-3294

v.

Charles McDonald — **DECISION AND JUDGMENT**

Appellant — Decided: February 19, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Brenda J. Majdalani, Assistant Prosecuting Attorney, for appellee.

Matthew N. Fech, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Defendant-appellant, Charles McDonald, appeals the January 9, 2008 judgment of the Lucas County Court of Common Pleas which, following a jury trial

convicting him of murder, sentenced appellant to 15 years to life in prison. For the reasons that follow, we affirm the trial court's judgment.

{¶ 2} On October 16, 2006, appellant was indicted on one count of murder, in violation of R.C. 2903.02(A). The charge stemmed from the September 25, 2006 murder of Erika Graham. Appellant entered a not guilty plea to the charge. On April 18, 2007, appellant was charged, in case No. CR07-1807, with one count of conspiracy to commit murder in connection with an alleged plan to murder a state witness. Appellant entered a not guilty plea to the charge. The cases were consolidated for trial.

{¶ 3} The state's theory at trial was that appellant, who purchased a .25 caliber semi-automatic weapon the day before the shooting, went to the victim's apartment, between 2:00 and 4:00 a.m. and, while she was sleeping, shot her in the head at close range. The state presented the testimony of Michael Karibian who stated that on September 24, 2006, appellant came to his home and purchased a .25 caliber semi-automatic weapon. According to Karibian, appellant told him that he wanted the gun to protect his vehicle. Karibian stated that appellant called him twice after the shooting wanting know if the police had contacted him and requested that, if they did, he inform them that appellant purchased a .22 caliber rather than a .25 caliber weapon. The shell casing found at the crime scene was consistent with the gun sold to appellant.

{¶ 4} State's witness, Shekita Henderson, testified that her apartment's back door is across the parking lot from the victim's back door. Henderson stated that on September

25, 2006, at approximately 2:45 a.m., she observed a man banging on the victim's back door. Henderson stated that she could not see the man's face but that the body type was similar to appellant's. According to Henderson, she called out "Charles" and the man answered: "Yeah." Henderson admitted to lying to police during her first, videotaped police interview.

{¶ 5} Janelle Lipkins, appellant's former girlfriend, testified that on September 24, 2006, she drove appellant to a co-worker's house; appellant said he wanted to speak with him about a "work issue." Lipkins waited in the car. That night, Lipkins spent the night at appellant's home. Lipkins stated that at around 10:00 p.m., appellant left his house to meet some friends. Appellant returned at about 2:30 a.m. Lipkins testified that appellant left the house again and took her car. He did not return until 4:00 a.m. Appellant then left for work at about 6:30 a.m. Lipkins testified that appellant telephoned her at approximately 7:15 a.m. and told her that Graham had been shot. It was undisputed that Graham's body was not discovered until 9:00 a.m.

{¶ 6} Appellant's friend, Kevin Price, testified that on Sunday, September 24, 2006, he met appellant at a bar at approximately 11:30 p.m.; they parted ways at approximately 2:30 a.m. Price testified that he met appellant and Lipkins at White Tower at about 4:00 a.m.

{¶ 7} Regarding the conspiracy charge, Thomas Bean testified that he met up with appellant in the county jail. Bean stated that appellant wanted him to eliminate a

witness. Bean informed police about the conversation and he went back to jail wearing a hidden microphone. The recorded statement, which consisted mainly of Bean repeating appellant's alleged statements, was played to the jury.

{¶ 8} Following the conclusion of the testimony, the jury found appellant guilty of murder and not guilty of conspiracy. Appellant then timely appealed. On appeal, appellant raises the following four assignments of error for our review:

{¶ 9} "I. The misconduct of the prosecution in this case deprived defendant of the right to a fair trial and effective assistance of counsel, in violation of the Sixth and Fourteenth Amendments to the U.S. Constitution and Article I, § 10 of the Ohio Constitution.

{¶ 10} "II. The trial court erred in denying defendant's motion to compel the state to produce its entire file under seal for appellate review.

{¶ 11} "III. The trial court abused its discretion by limiting the defendant's cross-examination of witnesses, thereby depriving defendant of a fair trial and effective assistance of counsel, in violation of the Sixth and Fourteenth Amendments to the U.S. Constitution and Article I, § 10 of the Ohio Constitution.

{¶ 12} "IV. The cumulative errors in this case warrant a reversal of the conviction."

{¶ 13} In appellant's first assignment of error, he contends that there were several instances of prosecutorial misconduct which denied appellant his right to a fair trial.

Appellant first argues that during closing arguments the prosecutor made improper inferences; to wit, that appellant disposed of the murder weapon and that appellant's demeanor during trial was not consistent with that of an innocent person.

{¶ 14} Generally, a prosecutor's conduct at trial is not grounds for reversal unless that conduct deprived the defendant of a fair trial. *State v. Loza* (1994), 71 Ohio St.3d 61, 78, overruled on other grounds. "The test for prosecutorial misconduct is whether the remarks were improper and, if so, whether they prejudicially affected substantial rights of the accused." *State v. Eley*, 77 Ohio St.3d 174, 187, 1996-Ohio-323, overruled on other grounds; *State v. Lott* (1990), 51 Ohio St.3d 160.

{¶ 15} Prosecutors generally are entitled to considerable latitude in opening statement and closing argument. *State v. Ballew*, 76 Ohio St.3d 244, 255, 1996-Ohio-81. In closing argument, a prosecutor may comment freely on "what the evidence has shown and what inferences can be drawn therefrom." *State v. Richey*, 64 Ohio St.3d 353, 362, 1992-Ohio-44, overruled on other grounds; *State v. McGuire*, 80 Ohio St.3d 390, 402-404, 1997-Ohio-335. Prosecutors may not, however, invade the realm of the jury by rendering their personal beliefs regarding guilt and credibility, or alluding to matters outside of the record. *State v. Smith* (1984), 14 Ohio St.3d 13, 14. Nevertheless, since isolated instances of prosecutorial misconduct are usually harmless, any alleged misconduct in the closing argument must be viewed within the context of the entire trial to determine if any prejudice has occurred. See *Ballew* at 255; *State v. Lorraine* (1993),

66 Ohio St.3d 414, 420. To determine if the alleged misconduct resulted in prejudice, an appellate court should consider the following factors: "(1) the nature of the remarks, (2) whether an objection was made by counsel, (3) whether corrective instructions were given by the court, and (4) the strength of the evidence against the defendant." (Citations omitted.) *State v. Braxton* (1995), 102 Ohio App.3d 28, 41.

{¶ 16} During the state's closing argument, the prosecutor stated:

{¶ 17} "Inconsistency, the Defendant tells Janelle Lipkins that he needs to see Michael Karibian about a problem at work. Inconsistent with him secretly – secretly going to Michael Karibian and buying a .25 caliber gun. That's inconsistent. The defendant tells Michael Karibian that he needs a gun to protect his truck. That's what he told Michael. What's inconsistent, the gun was never found."

{¶ 18} At this point, defense counsel objected arguing that the state's continual references to the fact that the gun was not recovered improperly shifted the burden of proof to appellant. Counsel further argued that there was no testimony presented that the police searched for, but were unable to recover, the gun. Particularly, counsel objected to the state's reference to a search of appellant's house.[1]

{¶ 19} Reviewing the trial transcript, we find that Toledo Police Detective Jerry Schriefer did testify regarding his search for the weapon. Detective Schriefer testified that he searched part of appellant's garbage route, the landfill where the truck had

[1]We could find no such reference.

dumped its refuse, and appellant's vehicle. Accordingly, the prosecutor did not engage in misconduct by stating the evidence that had been presented and drawing an inference therefrom.

{¶ 20} Appellant next argues that during closing argument the prosecutor improperly "alluded a personal opinion" as to appellant's guilt. Appellant cites the following:

{¶ 21} "One of the things you can use as evidence in this case is how this man acted in Court. Romeo and Juliet. When Romeo saw Juliet, he was devastated that she was dead. During this trial there have been pictures of Erika Graham on the screen and the screen down the hall, showing her with a bullet in her eye. There were pictures on this screen and other screens of her being dissected like a frog on a high school science table."

{¶ 22} Defense counsel then objected and the objection was sustained. The court warned the prosecutor that he was "getting into inflammatory comments" including the reaction of the defendant to the pictures. The prosecutor continued:

{¶ 23} "There was pictures of Erika Graham's head being sliced open and a bullet found inside State's Exhibit 24. Dr. Beissier testified standing in front of you right down at the other jury box about how a bullet pierced her eye, entered her brain, destroyed material and fractured her skull on the other side when it lodged against her skull. Was that the reaction you would expect from a man in love?"

{¶ 24} Defense counsel again objected and the trial court sustained the objection and instructed the jury to disregard the comment. Following closing arguments, defense counsel renewed his motion for a mistrial based upon prosecutorial misconduct in the use of "inflammatory language" and references to evidence that had not been introduced. The motion was denied.

{¶ 25} The trial court then issued the following curative instructions to the jury:

{¶ 26} "Now ladies and gentlemen, during the course of the Prosecutor's arguments there was reference to a search being made of the Defendant's house. There was no evidence presented during the course of this trial of any search of the Defendant's house. I am instructing you to disregard that statement, not to consider it for any purpose, nor are you to speculate as to whether a search occurred or did not occur and it should not be a part of your deliberations."

{¶ 27} Upon review, we agree that the prosecutor's statement regarding appellant's demeanor as the autopsy photographs were displayed was improper. However, the court sustained the objection and instructed the jury to disregard the statement. In addition, the court issued the standard instruction that closing arguments are not evidence. The jury is presumed to follow the court's instructions. See *State v. Henderson* (1988), 39 Ohio St.3d 24, 33. Thus, any error in the prosecutor's comments was harmless.

{¶ 28} Based upon the above alleged instances of prosecutorial misconduct, appellant further argues that his motion for a mistrial should have been granted. 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, 1995-Ohio-168. An abuse of discretion connotes that the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 29} When, however, the motion alleges prosecutorial misconduct, "a reviewing court must undertake a due process analysis to determine whether the conduct of the prosecutor deprived the defendant of his or her due process right to a fair trial." *State v. Saunders* (1994), 98 Ohio App.3d 355, 358, citing *State v. Johnston* (1988), 39 Ohio St.3d 48, 60. An appellant is entitled to a new trial only when a prosecutor asks improper questions or makes improper remarks and those questions or remarks substantially prejudice appellant. *State v. Smith* (1984), 14 Ohio St.3d 13, 14. In analyzing whether an appellant was deprived of a fair trial, an appellate court must determine whether, absent the improper questions or remarks, the jury would have found the appellant guilty beyond a reasonable doubt. *State v. Maurer* (1984), 15 Ohio St.3d 239, 267.

{¶ 30} As set forth above, any error in the prosecutor's comments regarding appellant's demeanor at trial was harmless. Defense counsel's objection was sustained and the jury was instructed to disregard the comments.

{¶ 31} The next area of alleged prosecutorial misconduct relates to an alleged discovery violation. Appellant contends that the state failed to properly disclose all of appellant's statements as required by Crim.R. 16(B)(1)(a). Specifically, appellant argues

that the state failed to provide a letter that appellant, using the pseudonym "Annie Oakley," allegedly wrote to witness Janelle Lipkins. The state counters that it neither knew nor had reason to know that the letter was written by appellant.

{¶ 32} Crim.R. 16(B) provides, in relevant part:

{¶ 33} "(B) Disclosure of evidence by the prosecuting attorney

{¶ 34} "(1) Information subject to disclosure.

{¶ 35} "(a) Statement of defendant or co-defendant. Upon motion of the defendant, the court shall order the prosecuting attorney to permit the defendant to inspect the copy or photograph any of the following which are available to, or within the possession, custody, or control of the state, the existence of which is known or by the exercise of due diligence may become known to the prosecuting attorney:

{¶ 36} "(i) Relevant written or recorded statements made by the defendant or co-defendant, or copies thereof; * * *."

{¶ 37} During her testimony on redirect examination, Janelle Lipkins was questioned about a letter she referenced during cross-examination that was allegedly written by appellant. Lipkins stated that she gave the letter to Detective Anderson. Defense counsel objected to any testimony relating to the letter by arguing that it was not provided during discovery.

{¶ 38} Thereafter, in the judge's chambers, the state continued to argue that it did not have the letter in question. Detective Anderson was brought into chambers and

indicated that he had a vague recollection of a letter using the pseudonym "Annie Oakley." Detective Anderson stated that he thought that he had spoken to the prosecution about the letter and had given it to them; he was not sure. Anderson further indicated that "the issue at the time was we couldn't say who it was from because of the, like I said, she didn't sign it her name and his name wasn't on it." Detective Anderson stated that the only way they could verify the author and intended recipient of the letter would be to verify the "pen names."

{¶ 39} Following questioning, the trial court sustained defense counsel's objection and prohibited the state from any further questioning of Lipkins regarding a letter she received from appellant. The state was permitted to, and did ask, if Lipkins wrote her letter to appellant in response to a letter he had written her. Lipkins responded positively. There was no further testimony presented regarding the "Annie Oakley" letter.

{¶ 40} Appellant now argues that by permitting testimony of appellant's letter to Lipkins, the state, effectively, demonstrated that whatever appellant wrote to her upset her and that it was pertinent to Erika Graham. From the testimony presented at trial, it appears that Ms. Lipkins was upset because she had been hearing rumors in the community that appellant had been seeing other women during the same period they were dating. There was nothing presented to show that Lipkins was upset about the contents of appellant's letter.

{¶ 41} Based on the foregoing, we conclude that because there was no definitive finding that the letter at issue was, in fact, written by appellant and there was no suggestion that the letter was material to appellant's defense, the state did not commit misconduct in failing to disclose the letter. Further, we find that the trial court did not abuse its discretion when it allowed limited testimony regarding the letter.

{¶ 42} Finally, appellant argues that the state committed misconduct by failing to disclose evidence favorable to appellant and material to his guilt or innocence. Appellant asserts that the state was required to provide appellant with evidence of inconsistencies in the statements that witness Shekita Henderson gave to police. The state makes the following counter-arguments: Crim.R. 16(B)(1)(g) does not permit the discovery of inconsistent statements prior to trial; under Crim.R. 16(B)(1)(f), the state is under no obligation to create summaries of witness statements; and that because the witness never adopted the investigator's notes, they were not discoverable because they were not statements.

{¶ 43} The relevant portions of Crim.R. 16(B)(1) provide:

{¶ 44} "(B) Disclosure of evidence by the prosecuting attorney

{¶ 45} "(1) Information subject to disclosure.

{¶ 46} " * * *

{¶ 47} "(f) Disclosure of evidence favorable to defendant. Upon motion of the defendant before trial the court shall order the prosecuting attorney to disclose to counsel

for the defendant all evidence, known or which may become known to the prosecuting attorney, favorable to the defendant and material either to guilt or punishment. The certification and the perpetuation provisions of subsection (B)(1)(e) apply to this subsection.

{¶ 48} "(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.

{¶ 49} "If the court determines that inconsistencies exist, the statement shall be given to the defense attorney for use in cross-examination of the witness as to the inconsistencies.

{¶ 50} "If the court determines that inconsistencies do not exist the statement shall not be given to the defense attorney and he shall not be permitted to cross-examine or comment thereon.

{¶ 51} "Whenever the defense attorney is not given the entire statement, it shall be preserved in the records of the court to be made available to the appellate court in the event of an appeal.

{¶ 52} "(2) Information not subject to disclosure. Except as provided in subsections (B)(1)(a), (b), (d), (f), and (g), this rule does not authorize the discovery or

inspection of reports, memoranda, or other internal documents made by the prosecuting attorney or his agents in connection with the investigation or prosecution of the case or of statements made by witnesses or prospective witnesses to state agents."

{¶ 53} Shekita Henderson was questioned extensively regarding her inconsistent statements to police. During direct examination, Henderson testified that on September 25, 2006, she got off of work at approximately 2:45-3:00 a.m. and returned home. Henderson testified that Erika Graham lived behind her in the housing complex and that she could see Graham's apartment from hers. Henderson was aware that appellant had been dating Graham. Henderson testified that she saw someone pounding on Graham's door. Henderson testified that it was too dark to see a face but the body type was similar to appellant's. Henderson stated that she called appellant's name and that he responded: "Yeah." Henderson then went into her apartment.

{¶ 54} Following Henderson's testimony, defense counsel made a motion, pursuant to Crim.R. 16(B)(1)(g), to examine Henderson's videotaped police interview for inconsistencies with her trial testimony. The request was granted.

{¶ 55} After viewing the videotape in the judge's chambers, defense counsel noted several inconsistencies between Henderson's testimony during direct examination and her statement to police. Henderson stated to police the she arrived home at 2:22 a.m. Henderson claimed that she did not recognize the individual at Graham's door; yet, she testified that she called out to appellant.

{¶ 56} During cross-examination, Henderson was questioned regarding her September 26, 2006 statement to Detective Anderson. Henderson admitted that the time she told Anderson that she arrived home was not accurate. Henderson denied telling Detective Anderson that she did not know who the individual at Graham's door was or that she called out appellant's name.

{¶ 57} At this point, defense counsel requested that the entire videotaped statement be played for the jury. In chambers, defense counsel argued that the entire tape needed to be played in order for the jury to learn that at no time during the interview with Detective Anderson did Henderson give a physical description of the individual at Graham's back door. The state contended that Henderson could not be impeached with the videotape by a statement she made during cross-examination.

{¶ 58} Upon review, we note that pursuant to Crim.R. 16(B)(1)(g), appellant was given the opportunity to review Henderson's videotaped statement and cross-examine her as to any inconsistencies between her interview and direct-examination. We agree that the rule does not provide for the use of the statement when additional inconsistencies are discovered during cross-examination. See *State v. Calhoun*, 8th Dist. No. 91328, 2009-Ohio-2361, ¶ 41. Accordingly, we find that the trial court did not abuse its discretion when it prohibited appellant from playing Henderson's videotaped statement for the jury.

{¶ 59} Appellant further argues that he was entitled to any additional summaries or statements that Henderson made to Detective Anderson. The state asserts that, under

Crim.R. 16(B)(1)(f), it had no obligation to create summaries of any additional interviews of Henderson. The state further argues that interview notes are not a "statement," as used in Crim.R. 16, because they are not signed or otherwise approved by the witness.

{¶ 60} In *State v. Cunningham*, 105 Ohio St.3d 197, 2004-Ohio-7007, the Supreme Court of Ohio addressed a defendant's right to the inspection of pretrial state witness' statements for inconsistencies. The court noted that:

{¶ 61} "'[T]hose portions of a testifying officer's signed report concerning his observations and recollection of the events are "statements" within the meaning of Crim.R. 16(B)(1)(g). Those portions which recite matters beyond the witnesses' personal observations, *such as notes regarding another witness' statement* or the officer's investigative decisions, interpretations and interpolations, are privileged and excluded from discovery under Crim.R. 16(B)(2).'" (Emphasis in original.) Id. at ¶ 43, quoting *State v. Jenkins* (1984), 15 Ohio St.3d 164, 225.

{¶ 62} The court stated that, unlike *Jenkins*, the testifying witnesses were the victims of the shootings and the pretrial statements were actually summaries written by the investigating officers. The court further observed that:

{¶ 63} "Nothing in the record indicates that these witnesses had reviewed, signed, adopted, or otherwise approved the material in the police reports as their own statements. There is no proof that the police officers' summaries are an accurate reproduction of the

witnesses' own words. Therefore, we find that these pretrial statements are not statements subject to an in camera inspection under Crim.R. 16(B)(1)(g)." Id. at ¶ 44.

{¶ 64} In the present case, as in *Cunningham*, there is no evidence to suggest that Henderson approved any notes taken by Detective Anderson during any additional interviews. Accordingly, the state did not err by failing to provide such notes to the defense.

{¶ 65} Based on the foregoing, we find that the state's actions during closing argument and with regard to its discovery obligations did not deny appellant a fair trial. We further find that the state did not violate its obligation under *Brady v. Maryland* (1963), 373 U.S. 83, to provide all exculpatory material relevant to appellant's guilt or punishment. Accordingly, appellant's first assignment of error is not well-taken.

{¶ 66} In appellant's second assignment of error, he contends that the trial court erred when it denied his motion to compel the state to produce its entire file under seal for appellate review. The state asserts that the trial court did, in fact, grant appellant's motion in its January 9, 2008 judgment entry but that it "respectfully declines to do so." The state also acknowledged that it did not appeal this portion of the trial court's judgment but "requests that this court fully address this issue."

{¶ 67} Upon review, we find that because contempt proceedings were not pursued either in the trial court or in this court, the matter is not properly before us to review. We further note that, in looking at the merits of appellant's argument, we fail to see how

access to the state's entire case file would aid this court in deciding appellant's appeal. Appellant's second assignment of error is not well-taken.

{¶ 68} Appellant's third assignment of error asserts that the trial court abused its discretion by limiting defense counsel's cross-examination of state witness, Thomas Bean. The state presented Bean's testimony to establish that appellant had put a "hit" out on witness Janelle Lipkins. During cross-examination, defense counsel attempted to impeach Bean's credibility by questioning him about a prior statement to Detective Anderson that Bean knew appellant from previously selling him marijuana. Defense counsel maintained that the testimony was intended to show that Bean was not truthful based upon prior, uncontroverted testimony that appellant did not drink or smoke (cigarettes or marijuana.) Bean "pleaded the fifth" as to the question; the state objected arguing that it was improper character impeachment.

{¶ 69} The witness and the parties moved into the judge's chambers to make further inquiries of Bean outside of the jury's presence. Bean stated that he was not willing to testify that he told Detective Anderson that he sold appellant marijuana. Defense counsel stressed that the testimony was relevant because it goes to Bean's identification of the proper individual in talking with Detective Anderson. Counsel reiterated that it also went to Bean's credibility in that if, in fact, appellant did not smoke marijuana, Bean was lying about selling it to him. The court then sustained the objection finding:

{¶ 70} "To allow that would also reflect upon the witness' alleged criminal activity, of which he has not been convicted or charged, and I'm going to sustain the State's objection and find that the potential for prejudice would outweigh the probative value of such testimony. There is other evidence in the case that raises a question about Mr. Bean's identification of the person at the jail as to whether it is this defendant, and so I'm not going to allow that."

{¶ 71} Appellant now argues that he should have been allowed to cross-examine Bean because his "purported connection" to appellant was "exaggerated or unbelievable." We note that the scope and extent of cross-examination is within the discretion of the trial court. *State v. Brinkley*, 105 Ohio St.3d 231, 2005-Ohio-1507, ¶ 109, quoting *State v. Green* (1993), 66 Ohio St.3d 141, 147. Upon review, we cannot say that the court abused its discretion when it limited defense counsel's cross-examination of Bean.

{¶ 72} Appellant further argues that the court erred by limiting defense counsel's cross-examination of Shekita Henderson. Defense counsel sought to impeach Henderson by use of a prior inconsistent statement. As set forth, infra, on direct examination, Henderson testified that during the early morning of September 25, 2006, she recognized appellant's body type, though she could not see his face. Henderson stated that she called out "Charles" and that appellant responded: "Yeah." During cross-examination, Henderson was further asked whether she told Detective Anderson that she called out appellant's name; her response was: "Yes I did." Defense counsel then attempted to use

Henderson's videotaped statement to demonstrate that she did not tell Detective Anderson that she called out to appellant. The court denied the request finding that Crim.R. 16 (B)(1)(g) limits the review of alleged inconsistent prior statements to a motion of the defendant following direct examination, not cross-examination.

{¶ 73} Upon review, we agree with the state that Crim.R. 16(B)(1)(g) does not contemplate the use of a prior written statement in instances where additional alleged inconsistencies are discovered during cross-examination. See *State v. Calhoun*, 8th Dist. No. 91328, 2009-Ohio-2361, ¶ 38-41. Accordingly appellant's third assignment of error is not well-taken.

{¶ 74} In appellant's fourth and final assignment of error, he contends that the cumulative effect of errors deprived appellant of a fair trial. We have stated that "although a particular error by itself may not constitute prejudicial error, the cumulative effect of the errors may deprive a defendant of a fair trial and may warrant the reversal of his conviction." *State v. Hemsley*, 6th Dist. No. WM-02-010, 2003-Ohio-5192, ¶ 32, citing *State v. DeMarco* (1987), 31 Ohio St.3d 191, paragraph two of the syllabus. "'However, in order even to consider whether "cumulative" error is present, we would first have to find that multiple errors were committed in this case.'" *Hemsley* at ¶ 32, quoting *State v. Madrigal*, 87 Ohio St.3d 378, 398, 2000-Ohio-448.

{¶ 75} Upon review of appellant's preceding three assignments of error, we cannot say that there were multiple instances of harmless error; accordingly, there can be no cumulative error. Appellant's fourth assignment of error is not well-taken.

{¶ 76} 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