[Cite as *State v. Brenson*, 2010-Ohio-4645.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. W. Scott Gwin, P.J.
	:	Hon. John W. Wise, J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	
-vs-	:	
	:	Case No. 09-CA-18
JAMES BRENSON	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Delaware County Court of Common Pleas, Case No. 08-CRI-04-0207A
JUDGMENT:	Affirmed in part, Reversed in part Remanded
DATE OF JUDGMENT ENTRY:	September 28, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
DAVID A. YOST DELAWARE PROSECUTING ATTORNEY BY: KYLE ROHRER 140 N. Sandusky St., 3rd Fl. Delaware, OH 43015	WILLIAM T. CRAMER 470 Olde Worthington Road, Ste. 200 Westerville, OH 43082

Gwin, P.J.

{¶1} Defendant-appellant, James Brenson, appeals his convictions for one count of aggravated murder, in violation of R.C. 2903.01(A), one count of aggravated murder, in violation of R.C. 2903.01(B), murder with repeat violent offender specification in violation of R.C. 2903.02(B), kidnapping with repeat violent offender specification in violation of R.C. 2905.01(A)(2), kidnapping with repeat violent offender specification in violation of R.C. 2905.01(A)(3), aggravated robbery with repeat violent offender specification in violation of R.C. 2911.01(A)(1), and one count of aggravated robbery with repeat violent offender specification in violation of R.C. 2911.01(A)(3). Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On June 11, 2000, at approximately 10:00 p.m., Norman "Duck" Herrell was at his home talking on the telephone with his ex-wife, Phyllis Gaskins. A knock on the door at Herrell's house interrupted the conversation. Herrell told Gaskins that he would call her back, but he never called.

{¶3} The next morning, Herrell did not report to work at his furniture store, J&D furniture. His son, Michael Herrell, became concerned, and tried repeatedly to call his father throughout the day. When he still could not reach Herrell by the afternoon, Michael went to Herrell's house to check on him.

{¶4} Michael testified at trial that when he arrived at Herrell's house, the door was unlocked and there were blankets hanging over the windows in the living room. Michael stated that his father was an immaculate housekeeper and that when he entered the home on June 12th, the house was a mess, it appeared to have been

ransacked, and Herrell's gun cabinet was open and his guns were missing. Michael found his father lying face down on the floor in a pool of blood in the basement. He called 911.

{¶5} The arriving officers searched the house for additional victims or suspects. No one else was found to be in the residence. They also checked for, but did not find, evidence of a forced entry.

{¶6} After determining that Herrell's death was a homicide, the Delaware Police Department contacted the Ohio Bureau of Criminal Investigation (B.C.I.) for assistance in processing the crime scene.

{¶7} While processing the scene, officers recovered several pieces of evidence. They recovered two knives, including a small brown knife from the love seat in the basement, which appeared to have blood on it. After DNA tests were run on the knife, it was determined that, the blood present on the knife was that of Herrell.

{¶8} Officers also recovered a pair of brown cloth gloves, which were saturated with blood. DNA recovered from those gloves matched both Herrell's DNA and subsequently that of Brenson's co-defendant William Allen. Additionally, authorities recovered a long-sleeved, blue shirt that later was determined to possess the DNA of Allen, as well as his wife, Silvy Allen[1].

{¶9} Officers also recovered a guest receipt from a Meijer store in Oregon, Ohio, which is near Toledo. They were able to determine that a person who identified himself as K.W. Yowpp made the purchase and a return on June 9, 2000[2]. K.W. Yowpp is a known alias of Brenson. Brenson's fingerprint was retrieved from the receipt.

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[1] The record reflects that the Allens were married in 2005.
[2] 15T. at 2233

{¶10} Brenson's fingerprint was also recovered from an envelope at Herrell's house containing a dog tag.

{¶11} While searching Herrell's home, authorities observed that many items in the house had been disturbed, including pictures taken off walls, chairs moved from the kitchen to rooms that had blankets over the windows, rooms that had been ransacked, as if the intruder(s) were looking for something. They also observed a large quantity of illegal fireworks in the basement of the house.

{¶12} Several days following the initial search of Herrell's house, authorities returned to the house after learning that Herrell had a safe hidden in the house. Herrell's family had not disclosed to the authorities that the safe existed, but after authorities asked about the safe, Herrell's daughter, who was the only person besides Herrell with the combination to the safe, opened it for them. Contained within the safe were silver coins, old stopwatches, a deed to rental property owned by Herrell, and some jewelry.

{¶13} Franklin County Deputy Coroner, Dorothy Dean, testified that Herrell had been stabbed fifty-one times. Three of the stab wounds were potentially fatal.

{¶14} During the investigation of Herrell's murder, officers discovered that Herrell and Brenson spent several months in prison together at Marion Correctional Institution in 1981. Herrell's children were also familiar with Brenson, having seen him with Herrell before. Herrell's children identified Brenson as "Muhammad."

{¶15} Sometime in 2001, officers learned that Ohio Highway Patrol Trooper Brandon Spaulding stopped Brenson during the evening hours of June 11, 2000, on U.S. 23 South in the area of Bucyrus, Ohio. Trooper Spaulding testified at trial that he

was running license plates on vehicles at a rest area, when he ran the license plate on Brenson's red Ford F-150 at approximately 8:51 p.m. The truck was registered to Mustafa Muhammad, which is Brenson's son. At that time, Trooper Spaulding believed that the license plate on the truck actually belonged on a different vehicle. The trooper pulled his cruiser up behind Brenson's vehicle and got out of his cruiser to approach Brenson. Upon approaching Brenson, Trooper Spaulding noted that Brenson was sitting in the vehicle alone.

{¶16} Trooper Spaulding determined that he had conveyed one of the letters on the license plate incorrectly to the dispatcher, and started to explain the mistake to Brenson. Brenson became angry and began swearing at the trooper, claiming that the trooper was harassing him because of his race. Trooper Spaulding noticed that Brenson's front license plate was in the dashboard. He warned Brenson to attach the license plate to the front of the vehicle. Eight minutes after he initiated the stop, Trooper Spaulding cleared the call and left the rest stop.

{¶17} According to Brenson[3], he then went to the next exit to obtain materials to attach the license plate to the front of the truck. Brenson testified in 2002 and 2008 before the Delaware County grand jury that he was on his way to Delaware, Ohio, to purchase fireworks from Herrell. He also stated in his 2008 grand jury testimony that he purchased zip ties to secure the license plate to the front of the truck[4].

[3] Brenson did not testify at trial. He did, however, testify twice before the Delaware County Grand Jury. He first testified on April 18, 2002. He testified a second time on April 15, 2008. Additionally, he agreed to meet with police detectives for an interview on January 14, 2003. It is from a combination of these three occasions that the prosecution introduced various statements made by Defendant Brenson at trial.

[4] The prosecution attempted to demonstrate that a search of Brenson's vehicle in October 1999 yielded similar plastic zip ties in order to show that he did not purchase the plastic ties because of the June 11, 2000 traffic encounter with Trooper Spaulding. (12T. at 1390; 1395).

{¶18} In March 2001, the police recovered Brenson's truck, and found no blood in the truck. They did find that his front license plate was attached to the front of the truck with a coat hanger.[5]

{¶19} At trial, Phyllis Gaskins testified that when she was speaking on the phone with Herrell on the night of June 11, 2000, he told her that two "white guys" were at the door. She later retracted her statement, claiming that Herrell would not have called the men "white guys." Brenson later told authorities that he saw a van with "two white guys" come up to Herrell's house as he was leaving. He claimed they were in a white van with Cuyahoga County license plates on it.

{¶20} Brenson told the grand jury that he left Herrell's house that night and returned to Toledo, arriving home around 11:00 or 12:00 that night[6].

{¶21} Brenson also testified before the grand jury that he and Allen had been friends since 1979, that they both lived in Toledo, and that they had taken numerous trips together over the years. At trial, the prosecution called numerous friends and family members of Brenson to testify that they had seen Brenson with Allen multiple times throughout the years.

{¶22} In October 2005, Allen became linked to Brenson through an informant. Allen reported being the victim of a felonious assault. As a result, the police obtained a blood sample from Allen. Subsequently, police were able to link Allen's DNA to the shirt

[5] See note four, supra.

[6] Brenson did not testify at trial. He did, however, testify twice before the Delaware County Grand Jury. He first testified on April 18, 2002. He testified a second time on April 15, 2008. Additionally, he agreed to meet with police detectives for an interview on January 14, 2003. It is from a combination of these three occasions that the prosecution introduced various statements made by Defendant Brenson at trial.

found in Herrell's kitchen. Allen was also found to have a 1-in-30 chance of being a contributor to the DNA found on the blood soaked cloth gloves in Herrell's kitchen.

{¶23} Prior to being informed that his DNA was found at the scene of a crime, during an interview with the police in 2005 when he was the victim of a felonious assault, Allen informed the police that he was good friends with Brenson, whom he identified as "Muhammad." When the police showed Allen a photograph of Herrell, his demeanor changed and he looked at the picture and stated that he did not know him.

{¶24} A car dealer in Toledo testified at trial that in April 2000, Allen purchased a car for $600 and then sold it back in July 2000 for $200. Shanica Masadeh, Silvy Allen's daughter, testified at trial that Silvy and Allen suddenly moved to Florida in July 2000, and that Silvy gave custody of her to Silvy's grandmother because Silvy could not support her. The police obtained records from Florida that Allen and Silvy both worked for a temporary agency from August 8, 2000, to December 20, 2000.

{¶25} Brenson's first defense attorney, Thomas Beal, testified at trial that he had a conversation with the Delaware County Prosecutor on December 3, 2000, that the indictment against Brenson would be dismissed, most likely by December 15, 2000. Allen then returned to Ohio in late December, 2000.

{¶26} Brenson was originally indicted for the murder of Herrell in Delaware County Common Pleas Case Number 00-CR-I-07-0195 on July 28, 2000. That case was dismissed without prejudice on January 16, 2001, at the request of the prosecution for further investigation.

{¶27} Seven years later, a second indictment was issued on April 16, 2008, wherein both Brenson and Allen were indicted on two counts of aggravated murder,

unclassified felonies, in violation of R.C. 2903.01(A) and R.C. 2903.01(B), respectively, one count of murder, an unclassified felony, in violation of R.C. 2903.02(B), one count of kidnapping, a felony of the first degree, in violation of R.C. 2905.01(A)(2), one count of kidnapping, a felony of the first degree, in violation of R.C. 2905.01(A)(3), one count of aggravated robbery, a felony of the first degree, in violation of R.C. 2911.01(A)(3), and one count of aggravated robbery, a felony of the first degree, in violation of R.C. 2911.01(A)(1).

{¶28} Following their convictions, both defendants were sentenced to an aggregate of thirty years to life in prison.

{¶29} Brenson timely appeals and raises the following fourteen assignments of error:

{¶30} "I. BRENSON'S RIGHT TO A SPEEDY TRIAL UNDER THE SIXTH AMENDMENT AND SECTION 10, ARTICLE 1 OF THE OHIO CONSTITUTION WAS VIOLATED BY THE EIGHT-YEAR DELAY BETWEEN HIS INITIAL INDICTMENT AND EVENTUAL TRIAL.

{¶31} "II. BRENSON'S DUE PROCESS RIGHTS WERE VIOLATED BY THE EIGHT-YEAR DELAY IN BRINGING HIM TO TRIAL.

{¶32} "III. BRENSON WAS PREJUDICED BY THE TRIAL COURT'S REFUSAL TO SEVER HIS TRIAL FROM THAT OF ALLEN.

{¶33} "IV. BRENSON'S 2008 GRAND JURY TESTIMONY WAS OBTAINED IN VIOLATION OF HIS RIGHT TO COUNSEL AND SHOULD HAVE BEEN SUPPRESSED.

{¶34} "V. THE PROSECUTION ABUSED THE GRAND JURY PROCESS BY FAILING TO TELL BRENSON THAT CHARGES HAD ALREADY BEEN FILED AGAINST HIM PRIOR TO HIS 2008 TESTIMONY TO THE GRAND JURY.

{¶35} "VI. BRENSON'S RIGHT TO AN IMPARTIAL JURY WAS DENIED BY THE TRIAL COURT'S REFUSAL TO DISMISS JURORS WHO HAD BEEN EXPOSED TO PRE-TRIAL PUBLICITY REGARDING THE CASE.

{¶36} "VII. THE TRIAL COURT ABUSED ITS DISCRETION AND DENIED BRENSON HIS RIGHT TO A FAIR TRIAL BY FAILING TO GRANT MISTRIALS ON TWO OCCASIONS AFTER THE JURY WAS IMPROPERLY EXPOSED TO PREJUDICIAL INFORMATION.

{¶37} "VIII. THE TRIAL COURT ERRED IN PERMITTING THE TESTIMONY OF BRENSON'S PRIOR TRIAL ATTORNEY, BEAL, BECAUSE HIS TESTIMONY COULD ONLY BE RELEVANT IF THE JURY USED IT TO IMPERMISSIBLY STACK INFERENCES.

{¶38} "IX. THE TRIAL COURT ERRED BY SUBMITTING TO THE JURY THE TRANSCRIPTS OF BRENSON'S GRAND JURY TESTIMONY.

{¶39} "X. THE TRIAL COURT ERRED BY PERMITTING EXTENSIVE EVIDENCE REGARDING PRIOR CRIMES, WRONGS, AND BAD ACTS BY BRENSON.

{¶40} "XI. BRENSON WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

{¶41} "XII. BRENSON WAS DENIED A FAIR TRIAL BY THE CUMULATIVE EFFECT OF THE NUMEROUS ERRORS IN THIS TRIAL.

{¶42} "XIII. THE VERDICT OF GUILTY WAS AGAINST THE WEIGHT OF THE EVIDENCE.

{¶43} "XIV. BRENSON'S CONVICTIONS SHOULD HAVE MERGED INTO ONE COUNT OF AGGRAVATED MURDER AND ONE COUNT OF KIDNAPPING OR AGGRAVATED ROBBERY."

I & II

{¶44} In his first two assignments of error, Brenson argues that his right to a speedy trial was violated by the eight-year delay between his initial indictment and his eventual trial and that his due process rights were violated by the pre-indictment delay between the dismissal of his first indictment and the filing of his second indictment.[7]

{¶45} Brenson was first arrested and indicted in July 2000, but the indictment was dismissed in January 2001. Brenson was eventually re-indicted in April 2008 and brought to trial in July 2008. Brenson filed a Motion to Dismiss the Indictment on speedy trial grounds on May 23, 2008; the state responded on June 11, 2008. The trial court denied the motion by Judgment Entry filed June 13, 2008.

{¶46} A speedy-trial claim involves a mixed question of law and fact. *State v. Larkin,* Richland App. No. 2004-CA-103, 2005-Ohio-3122. As an appellate court, we must accept as true any facts found by the trial court and supported by competent, credible evidence. With regard to the legal issues, however, we apply a de novo

[7] Brenson is not arguing that his statutory right pursuant to R.C. 2945.71 was violated. Rather, appellant argues his constitutional right to a speedy trial under the Sixth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution, and, although not specifically cited in his brief, we believe appellant to be arguing further that his right to due process under the Fifth Amendment to the United States Constitution and Article I, Section 16 of the Ohio Constitution have been abrogated.

standard of review and thus freely review the trial court's application of the law to the facts. Id.

{¶47} When reviewing the legal issues presented in a speedy-trial claim, we must strictly construe the relevant statutes against the state. In *Brecksville v. Cook* (1996), 75 Ohio St.3d 53, 57, 661 N.E.2d 706, 709, the court reiterated its prior admonition "to strictly construe the speedy trial statutes against the state."

{¶48} Brenson cannot argue that his right to a speedy trial pursuant to R.C. 2945.71 was violated. We begin by noting that, by Motion #30 filed April 29, 2008 Brenson's trial counsel requested a continuance of the original trial date of May 2, 2008. The trial court conducted a hearing on that request on April 29, 2008, together with other motions that the defense had filed. At the hearing on the request, Brenson himself objected to any continuance of the trial date. (2T., April 28, 2008 at 32-33; 37-39). However, counsel indicated that due to the posture of the case and need for further investigation and discovery they would be rendering ineffective assistance of counsel if they were to go forward on the date originally scheduled for trial. (Id. at 33-36). The trial court granted the continuance over Brenson's objection and scheduled the case for trial on July 8, 2008. (See, 2T., April 28, 2008 at 38-39); Judgment Entry filed April 29, 2008). Thus time was tolled between April 29, 2008 and the start of trial on July 8, 2008 and is excluded from any speedy trial time calculation. *State v. McBreen* (1978), 54 Ohio St.2d 315, 376 N.E.2d 593; *State v. Collins*, Tuscarawas App. No. 2003AP030019, 2003-Ohio-6407. Accordingly, Brenson's speedy trial rights under R.C. 2945.71 were not violated. R.C. 2945.72(H).

{¶49} The Sixth Amendment to the United States Constitution provides "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial * * *." This provision is applicable to state courts through the Fourteenth Amendment. *Klopfer v. North Carolina* (1967), 386 U.S. 213. The Ohio Constitution provides similar protection.

{¶50} "Section 10, Article I of the Ohio Constitution guarantees to the party accused in any court 'a speedy public trial by an impartial jury.' 'Throughout the long history of litigation involving application of the speedy trial statutes, this court has repeatedly announced that the trial courts are to strictly enforce the legislative mandates evident in these statutes. This court's announced position of strict enforcement has been grounded in the conclusion that the speedy trial statutes implement the constitutional guarantee of a public speedy trial.'" (Citations omitted.). *State v. Pachay* (1980), 64 Ohio St.2d 218, 221, 416 N.E.2d 589, 591.

{¶51} In *State v. Meeker* (1971), 26 Ohio St.2d 9, 268 N.E.2d 589, paragraph three of the syllabus, the Ohio Supreme Court held that "[t]he constitutional guarantees of a speedy trial are applicable to unjustifiable delays in commencing prosecution, as well as to unjustifiable delays after indictment." Subsequent to the Ohio Supreme Court's decision in *Meeker,* the United States Supreme Court ruled that the speedy trial guarantee under the Sixth Amendment has no applicability to pre-indictment delays. *United States v. Marion* (1971), 404 U.S. 307. In light of the *Marion* decision and its progeny, the Ohio Supreme Court held in *State v. Luck* (1984), 15 Ohio St.3d 150, 153, 472 N.E.2d 1097, that the Court's "holding in *Meeker* is viable only insofar as its application is limited to cases that are factually similar to it."

{¶52} In *State v. Selvage* (1997), 80 Ohio St.3d 465, 687 N.E.2d 433, 1997-Ohio-287, the Ohio Supreme Court revisited the issue of whether an individual's constitutional right to a speedy trial has been violated by a delay in prosecution. In *Selvage,* the Ohio Supreme Court reaffirmed its holding in *Meeker,* and noted that the speedy trial guarantee does not apply prior to indictment when the defendant has not been the subject of "official accusation." Id. at 466.

{¶53} In the case at bar, the trial court found that, “Brenson was the subject of official accusation at least as early as July 28, 2000, the date on which the original indictment was filed. Therefore, the Court must determine if this case is factually similar to *Meeker* in order to determine whether Brenson may assert a violation of his speedy trial right.” [Judgment Entry Denying Defendant Brenson's Motion to Dismiss Indictment (Motion #31), filed June 13, 2008 at 3]. The trial court found that the case at bar was factually distinguishable from the *Meeker* case. We agree.

{¶54} In *United States v. MacDonald* (1982), 456 U.S. 1, 102 S.Ct. 1497, the defendant was accused of committing a murder on a military base. The military brought charges, which were eventually dropped, and the defendant was honorably discharged. Four years later, the government obtained an indictment in federal district court charging the defendant with the crime. He claimed that the delay violated his Sixth Amendment right to a speedy trial. The Fourth Circuit agreed, applying the *Barker [v. Wingo* (1972), 407 U.S. 514, 92 S.Ct. 2182] factors. 632 F.2d 258, 266- 67 (4th Cir.1980). The Supreme Court reversed. 456 U.S. at 11, 102 S.Ct. 1497. The Court stated that the protections afforded by the speedy trial guarantee did not apply to the period after the dismissal of the military charges and before the civil indictment. During that time, the Court reasoned, there was no

pretrial incarceration, no impairment of liberty associated with being released on bail, and no "disruption of life caused by arrest and the presence of unresolved criminal charges." Id. at 8, 102 S.Ct. 1497. While the defendant perhaps suffered stress or anxiety, it was no greater than any other person under criminal investigation. Id. at 9, 102 S.Ct. 1497. Thus, the Due Process Clause, rather than the Sixth Amendment, provided the appropriate framework for analyzing the delay. "The Sixth Amendment right to a speedy trial is ... not primarily intended to prevent prejudice to the defense caused by passage of time; that interest is protected primarily by the Due Process Clause ...." Id. at 8. Thus, "[a]ny undue delay" before and after the period protected by the Sixth Amendment "must be scrutinized under the Due Process Clause ...." Id. at 7, 102 S.Ct. 1497; *United States v. Sanders* (6th Cir 2006), 452 F.3d 572, 579.

{¶55} The Ohio Supreme Court has espoused a similar view, “in *State v. Broughton* (1991), 62 Ohio St.3d 253, 581 N.E.2d 541, we considered a case in which a defendant was indicted on November 17, 1988, the indictment was dismissed as defective on July 18, 1989, and the defendant was later indicted on October 18, 1989. Id. at 254, 581 N.E.2d 541. This court held, ‘For purposes of computing how much time has run against the state under R.C. 2945.71 *et seq.,* the time period between the dismissal without prejudice of an original indictment and the filing of a subsequent indictment, premised upon the same facts as alleged in the original indictment, shall not be counted *unless the defendant is held in jail or released on bail pursuant to Crim.R. 12(I).*’ Id., paragraph one of the syllabus.” *State v. Azbell* (2006), 112 Ohio St.3d 300, 859 N.E.2d 532, 2006-Ohio-6552 at ¶ 17. (Emphasis added).

{¶56} In the case at bar, the trial court ordered Brenson released upon the dismissal of the previous indictment in January 2001. Because no charge was outstanding and he was not held pending the filing of new charges or released on bail or recognizance while awaiting the re-filing of charges Brenson did not become a "person against whom a charge of felony is pending" until he was arrested on the indictment in April 2008. *Azbell*, supra at ¶ 20.

{¶57} Thus, if a defendant is the subject of official accusation prior to indictment, the four-part test applicable to alleged constitutional speedy trial violations set forth in *Barker v. Wingo* (1972), 407 U.S. 514, 92 S.Ct. 2182 governs. *State v. Flickinger* (Jan. 19, 1999), Athens App. No. 98 CA 09 at n. 1. When the defendant is not the subject of official accusation, however, a delay in commencing prosecution does not implicate the defendant's constitutional speedy trial rights. *United States v. Marion* (1971), 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468; *State v. Luck* (1984), 15 Ohio St.3d 150, 153, 472 N.E.2d 1097, 1102. Additionally, when the government voluntarily dismisses charges, the Sixth Amendment does not require counting the time between indictments. Rather, in either case, the defendant may assert that the delay in commencing prosecution violated his due process rights under the Fifth Amendment and under Section 16, Article I of the Ohio. *United States v. Lovasco* (1977), 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752; *United States v. Marion* (1971), 404 U.S. 307, 92 S.Ct. 455; *State v. Luck* (1984), 15 Ohio St.3d 150, 153-54, 472 N.E.2d 1097, 1102. As the trial court recognized in the case at bar, the Sixth Amendment has no application to the case at bar. However, as the second syllabus in *Luck* states, "[a]n unjustified delay between the commission of an offense and a defendant's indictment therefore, which results in actual prejudice to the defendant, is a

violation of the right to due process of law under Section 16, Article I of the Ohio Constitution and the Fifth and Fourteenth Amendment to the United States Constitution." *Luck,* 15 Ohio St.3d at 154, 472 N.E.2d at 1102. See also, *United States v. Lovasco (*1977), 431 U.S. 783, 789-790, 97 S.Ct. 2044, 2049, 752; *Marion,* 404 U.S. at 324, 92 S.Ct. at 465, Furthermore, any claim of prejudice, such as the death of a key witness, lost evidence, or faded memories, must be balanced against the other evidence in the case in order to determine whether the defendant will suffer actual prejudice at trial. *Luck*, supra.

{¶58} When a defendant asserts a pre-indictment delay violated his due process rights, prejudice may not be presumed. *United States v. Crouch* (C.A.5, 1996), 84 F.3d 1497, 1514-1515. The notion that prejudice may be presumed from a lengthy delay arises in the context of the four-part balancing test used in determining whether a post-indictment or post-accusation delay has deprived a defendant of his Sixth Amendment right to a speedy trial. *Barker v. Wingo* (1972), 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101. The *Barker* four-part test, and the concept of presumptive prejudice, applies only to post-indictment or post-accusation delays that implicate the Sixth Amendment right to a speedy trial, and has no application to pre-indictment delays. *See, State v. Metz* (1998), Washington App. No. 96CA48, (Citation omitted); *State v. Harrell* (Dec. 29, 1998), Delaware App. No. 98CAA06029.

{¶59} The Ohio Supreme Court held that a delay in the commencement of prosecution by the state would be found unjustified when it is done in an attempt to gain a tactical advantage over the defendant, or when the state "through negligence or error in judgment, effectively ceases the active investigation of a case, but later decides to commence prosecution upon the same evidence that was available to it at the time that

its active investigation was ceased." *Luck,* 15 Ohio St.3d at 158. The Court also held that the length of delay would normally be a key factor in this determination. Id.

{¶60} In the case at bar, Brenson claims that the following prejudice has resulted from the delay between the dismissal of the original indictment and his re-indictment: (1) memories of witnesses have undoubtedly faded; (2) key evidence pertaining to the case is likely to have been lost and/or destroyed; (3) current addresses and/or other contact information for key witnesses is not currently known to Brenson which may prejudice his efforts to effectively investigate this case and possible defenses available to him; (4) key witnesses may have died; and (5) Brenson has been taken away from his wife and family. Brenson argues that the foregoing factors, when viewed in light of the state's reason for the delay in prosecution of this case, warrants dismissal of the indictment on due process grounds.

{¶61} The trial court found, “The prejudice that Brenson alleges in this case is potential prejudice and not actual prejudice. Brenson knows of no evidence or witnesses that are no longer available. Rather, Brenson merely speculates that witnesses may have died or that their memories may have faded.”

{¶62} The defendant has the burden of demonstrating prejudice. *E.g., United States v. Lawson* (6th Cir 1985)*,* 780 F.2d 535, 541-42. A lengthy delay in prosecuting the defendant, by itself, does not constitute actual prejudice. The defendant must demonstrate how the length of the delay has prejudiced his ability to have a fair trial. *United States v. Norris* (SD OH 2007), 501 F.Supp.2d 1092, 1096. In *United States v. Wright* (6th Cir 2003), 343 F.3d 849, 860, the Court held that loss of memory is insufficient to establish prejudice as a matter of law.

{¶63} In the case at bar, Brenson has failed to demonstrate how the testimony of "key" witnesses would have provided him with exculpatory evidence. Brenson has also failed to identify and demonstrate that key physical evidence is no longer available. Because Brenson has not provided the Court with a sufficient explanation of how his defense has been affected negatively by the pre-indictment delay, the Court cannot find that Brenson has suffered substantial prejudice.

{¶64} As the court stated in *State v. Glasper* (Feb. 2, 1997), Montgomery App. No. 15740, "The defendant will not satisfy his or her burden of proof by merely generally alleging the possible prejudice inherent in any delay, for example, that memories have faded, witnesses may be inaccessible, and evidence may be lost. The defendant must identify the specific prejudice suffered, and that prejudice must be substantial, for instance, that important taped witness interviews were destroyed or that key witnesses have died." In *State v. Flickinger*, supra the court noted, "a defendant must provide concrete proof that he will suffer actual prejudice at trial as a result of the government's delay in indicting the defendant. See, *e.g., Crouch,* 84 F.3d at 1515 (stating that vague assertions of faded memories are insufficient to establish actual prejudice; the defendant must state which witness is unable to fully recount the details of the crime and how the witness' lapsed memory will prejudice the defense); *United States v. Beszborn* (C.A.5, 1994) 21 F.3d 62, 67, certiorari denied *sub nom, Westmoreland v. United States,* 513 U.S. 934, 115 S.Ct. 330, 130 L.Ed.2d 288 (stating that vague assertions of faded memories are insufficient to establish actual prejudice); *United States v. Stierwalt* (C.A.8, 1994), 16 F.3d 282, 285 (stating that assertions of faded memories are insufficient to establish actual prejudice when the defendant fails to

specify how witness' lapsed memory will harm his defense); *United States v. Harrison* (S.D.N.Y.1991), 764 F.Supp. 29, 32 (stating that assertion of faded memories is insufficient to establish actual prejudice); *United States v. Greer* (D.Vt.1997), 956 F.Supp. 525, 528 (stating that a defendant must present concrete proof of actual prejudice and not mere speculation of actual prejudice)". *State v. Flickinger* (Jan. 19, 1999), Athens App. No. 98 CA 09A.

{¶65} In the case *sub judice,* we believe that Brenson's assertion that witnesses' memories have faded, that key evidence pertaining to the case is likely to have been lost and/or destroyed, and that current addresses and/or other contact information for key witnesses is not currently known to Brenson which may prejudice his efforts to effectively investigate this case and possible defenses available to him, are much too speculative and fail to rise to the level of concrete proof.

{¶66} We find, therefore, that Brenson has failed to establish that the delay in bringing the indictment caused Brenson actual prejudice.

{¶67} Assuming, *arguendo,* that Brenson had established the existence of actual prejudice, we believe that the state presented justifiable reasons for the delay that outweigh any prejudice Brenson may have suffered. Brenson has made no showing that the delay between the alleged incident and the indictment was an intentional device on the part of the Government to gain a decided tactical advantage in its prosecution. *United States v. Marion,* 404 U.S. at 324, 92 S.Ct. at 465. The lapse between the alleged incidents and the actual indictment was the result of investigative delay and the Government's efforts to make out its best case against Brenson.

{¶68} Accordingly, based upon the foregoing reasons, we overrule Brenson's first and second assignments of error.

III.

{¶69} In his third assignment of error, Brenson asserts that the trial court erred in refusing to sever his trial from that of his codefendant, William Allen. We disagree,

{¶70} Brenson and Allen were jointly indicted on seven counts related to the murder of Norman Herrell. In count one, both men were charged with the aggravated murder of Herrell under R.C. 2903.01(A). In count two, they were charged with the aggravated murder of Herrell under R.C. 2903.01(B). In count three, they were charged with Herrell's murder under R.C. 2903.02(B). In count four, they were charged with kidnapping under R.C. 2905.01(A) (2). In count five, they were charged with kidnapping under R.C. 2905.01(A) (3). In counts six and seven, the men were charged with aggravated robbery, in violation of R.C. 2911.01(A) (3) and R.C. 2911.01(A) (1), respectively.

{¶71} Defendants may be charged in the same indictment, pursuant to Ohio Crim. R. 8(B) as follows:

{¶72} "Two or more defendants may be charged in the same indictment, information or complaint if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses, or in the same course of criminal conduct. Such defendants may be charged in one or more counts together or separately, and all of the defendants need not be charged in each count."

{¶73} The law favors the joinder of defendants and the avoidance of multiple trials because joinder conserves judicial and prosecutorial time, lessens the expenses of multiple trials, diminishes the inconvenience to witnesses, and minimizes the possibility of incongruous results from successive trials before different juries. *State v. Thomas* (1980), 61 Ohio St.2d 223, 400 N.E.2d 401.

{¶74} In order to obtain a severance, a defendant needed to affirmatively demonstrate prejudice by the joinder. Crim.R. 14. Crim R. 14 provides, in pertinent part:

{¶75} "If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in an indictment, information, or complaint, or by such joinder for trial together of indictments, information or complaints, the court shall order an election or separate trial of counts, grant a severance of defendants, or provide such other relief as justice requires. In ruling on a motion by a defendant for severance, the court shall order the prosecuting attorney to deliver to the court for inspection pursuant to Rule 16(B)(1)(a) any statements or confessions made by the defendants which the state intends to introduce in evidence at the trial."

{¶76} The United States Supreme Court has stated, "a district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro v. United States* (1993), 506 U.S. 534, 539, 113 S.Ct. 933. Even where the risk of prejudice is high, "less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice." Id. Indeed, "[a] request for severance should be denied if a jury can properly compartmentalize the evidence as it relates to the appropriate defendants." *United*

States v. Causey (6th Cir. 1987), 834 F.2d 1277, 1287. Thus, to prevail on his severance argument, an appellant must show "compelling, specific, and actual prejudice from [the] court's refusal to grant the motion to sever." *United States v. Saadey* (6th Cir 2005), 393 F.3d 669, 678; *United States v. Driver* (6th Cir. 2008), 535 F.3d 424, 427.

{¶77} In this assignment of error, Brenson argues that the error at issue in this case, i.e. failure to conduct separate trials, created a risk that the jury would convict Brenson based on evidence that was attributable to his co-defendant, Allen.

{¶78} Brenson's Pre-Trial Motion to Sever

{¶79} In the case at bar, Allen filed a Motion for Relief from Prejudicial Joinder (Motion #30), filed on April 21, 2008, and Brenson's filed a Motion to Sever Trial (Motion #29), filed on April 25, 2008. The State of Ohio filed responses on April 24, 2008 and April 28, 2008, respectively. On April 30, 2008, the trial court ordered that any statements of Allen and Brenson be provided to the Court under Crim.R. 14. The State filed a Summary of Statements on May 8, 2008, and filed a Supplemental Summary of Statements for Virgil McClendon's Anticipated Testimony on May 14, 2008. Brenson filed a supplemental memorandum in support of his motion to sever on May 12, 2008. Allen filed a response to the State's Summary of Statements on May 15, 2008. The State filed a response to Allen's Response on May 16, 2008. Allen filed a reply thereto on May 19, 2008. The State also filed a response to Brenson's supplemental memorandum on May 19, 2008.

{¶80} The burden is upon the defendant to show good cause why a separate trial should be granted. In order to determine whether the trial court correctly ruled upon Brenson's pre-trial motion to sever filed May 23, 2008, we must review the evidence

(Pl Brenson and Allen presented to the trial court in support of each motion. Further, we must examine the trial court's review of that evidence when it denied the pre-trial motion to sever to determine whether Brenson and/or Allen affirmatively demonstrate prejudice by the joinder thereby demonstrating the trial court abused its discretion by overruling either or both pre-trial motions to sever.

{¶81} In determining whether to sever the trials of Allen and Brenson, the trial court reviewed the summary of statements filed by the State, in addition to the following: (1) interview with Allen on February 13, 2006; (2) interview with Allen on June 15, 2006; (3) interview with Allen on August 9, 2007; (4) interview with Brenson on January 14, 2003; (5) grand jury testimony of Brenson on April 18, 2002; (6) grand jury testimony of Brenson on April 15, 2008; (7) summary of statements of Allen to Virgil McClendon; and (8) statements of Brenson to Allen contained in letters. Judgment Entry Denying Defendant Allen's Motion for Relief From Prejudicial Joinder (Motion #30) and Defendant Brenson's Motion to Sever Trial (Motion #29), filed May 23, 2008 at 2.

{¶82} In reviewing the grounds submitted in support of the motions, the trial court noted, "Both Defendants maintain that certain statements made by the codefendant may tend to incriminate the other defendant without the opportunity to cross-examine the co-defendant about the statement." Judgment Entry Denying Defendant Allen's Motion for Relief From Prejudicial Joinder (Motion #30) and Defendant Brenson's Motion to Sever Trial (Motion #29), filed May 23, 2008 at 4.

{¶83} The trial court addressed the statements made by Allen. Law enforcement officers interviewed Allen on February 13, 2006, June 15, 2006, and August 9, 2007. During these interviews, Allen admitted that he knew Brenson and that he met him at

the Ohio Penitentiary. Allen further stated that he had never been to Delaware, Ohio. None of the statements made by Allen during these interviews are inculpatory of Brenson. Judgment Entry Denying Defendant Allen's Motion for Relief From Prejudicial Joinder (Motion #30) and Defendant Brenson's Motion to Sever Trial (Motion #29), filed May 23, 2008. The trial court found, "The statements made by Allen do not implicate Brenson in any wrongdoing; thus, the statements are not made "against" Brenson and the Sixth Amendment right to confrontation is not triggered. Thus, the statements made by Allen during his interviews are admissible. Judgment Entry denying Defendant Allen's Motion for Relief From prejudicial Joinder (Motion #30) and Defendant Brenson's Motion to Sever Trial (Motion #29), filed May 23, 2008 at 6-7.

{¶84} The State also sought to admit statements that Allen made to a cellmate, Virgil McClendon. The summary of McClendon's statement was presented to the Court in a supplemental summary filed on May 14, 2008. Brenson argued, "that McClendon will likely testify as to statements allegedly made by Allen in which he confessed to his involvement in the crimes charged. Specifically, Allen allegedly stated to McClendon that he committed the crimes with a friend who had previously been charged with the crimes, but the charges had been dismissed. Brenson argues that there is no question that the "friend" referred to by Allen could only be Brenson, as Brenson is the only other person previously charged with these crimes. Brenson contends that the State's attempt to elicit these extra judicial statements by Allen will deny Brenson his right to cross-examination." Judgment Entry Denying Defendant Allen's Motion for Relief From Prejudicial Joinder (Motion #30) and Defendant Brenson's Motion to Sever Trial (Motion #29), filed May 23, 2008 at 7.

{¶85} The State countered that "the majority of Allen's statements were not made against Brenson; therefore, the statements do not trigger the Confrontation Clause. The State suggests that any of Allen's statements, which do implicate Brenson, can be redacted prior to their admission at trial without violating Bruton. Brenson similarly argues that if the Court permits joinder, it should apply the ruling of Marsh by redacting from Allen's statements to McClendon any mention of the involvement of another individual in the death of the victim.

{¶86} The trial court ruled, "After reviewing the summary of McClendon's anticipated testimony, the Court determines that it will permit the testimony of McClendon regarding the statements made to him by Allen, except for the statements Allen made that 'they had let one guy go for the same murder.'" Judgment Entry Denying Defendant Allen's Motion for Relief From Prejudicial Joinder (Motion #30) and Defendant Brenson's Motion to Sever Trial (Motion #29), filed May 23, 2008 at 7-8.

{¶87} The trial court next reviewed the argument that both Allen and Brenson raised that they will be presenting mutually antagonistic defenses, and thus a joint trial will violate their constitutional rights. The trial court noted, "Brenson generally argues that the Defendants will present mutually antagonistic and hostile defenses." Judgment Entry Denying Defendant Allen's Motion for Relief From Prejudicial Joinder (Motion #30) and Defendant Brenson's Motion to Sever Trial (Motion #29), filed May 23, 2008 at 9.

{¶88} The trial court found that "Brenson fails to set forth any facts to establish any risk of prejudice." Judgment Entry Denying Defendant Allen's Motion for Relief From Prejudicial Joinder (Motion #30) and Defendant Brenson's Motion to Sever Trial (Motion #29), filed May 23, 2008 at 9. The trial court ruled, "Allen fails to demonstrate

how Brenson's statements regarding his relationship with the victim or his purchase of illegal fireworks from the victim results in the presentation of antagonistic defenses by the defendants… Moreover, the trial court can give instructions to the jury relating to multiple defendants - that the jury must separately decide the question of guilt or innocence of each of the defendants - thereby curing any risk of prejudice in this case." Id. at 9.

{¶89} Mutually Antagonistic Defenses

{¶90} A defendant is not entitled to severance based upon mutually antagonistic defenses unless "there is a serious risk that a joint trial could compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro v. United States* (1993), 506 U.S. 534, 539, 113 S.Ct. 933, 937.

{¶91} "A defendant reaches a level of antagonism (with respect to the defense of a co-defendant) that compels severance of that defendant, if the jury, in order to believe the core of testimony offered on behalf of that defendant, must necessarily disbelieve the testimony offered on behalf of his co-defendant. In such a situation, the co-defendants do indeed become the government's best witnesses against each other. Where two defendants present defenses that are antagonistic at their core, a substantial possibility exists that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty." *United States v. Berkowitz* (C.A.5, 1981), 662 F.2d 1127, 1133. (Internal quotation marks omitted). (Citations Omitted). Accord, *State v. Walters,* Franklin App. No. 06AP-693, 2007-Ohio-5554, at ¶ 23; *State v. Evans,* Scioto App. No. 08CA3268, 2010-Ohio-2554 at ¶ 43.

{¶92} "Notwithstanding such assertions, the courts have reversed relatively few convictions for failure to grant a severance on grounds of mutually antagonistic or irreconcilable defenses. See, *e.g., United States v. Tootick,* 952 F.2d 1078 (CA9 1991); *United States v. Rucker,* 915 F.2d 1511, 1512-1513 (CA11 1990); *United States v. Romanello,* 726 F.2d 173 (CA5 1984). The low rate of reversal may reflect the inability of defendants to prove a risk of prejudice in most cases." *Zafiro v. U.S.* (1993), 506 U.S. 534, 538, 113 S.Ct. 933, 937.

{¶93} After a thorough review of the record, we find no evidence suggesting that Brenson and Allen intended to present, or did present antagonistic defenses at trial. Rather it is clear in the case at bar that both Brenson and Allen maintained that he had nothing to do with the murder. Neither party presented testimony or evidence to incriminate the other person. Further, the state did not introduce the fact that Allen had made statements to a cellmate confessing his involvement in the crime and inculpating himself and Brenson.

{¶94} Accordingly, based on the record before the trial court when Brenson filed his written pretrial motion to sever the trial, and based upon the evidence presented at trial, we conclude that the trial court did not abuse its discretion in granting the motion in part, and denying that motion in part.

{¶95} Our inquiry, however, does not end there. Brenson also claims that, as the trial developed, he was substantially prejudiced by the joint trial. In the case at bar, Brenson renewed his objection to the trial court's overruling his pre-trial motion to sever prior to the close of the evidence. (13T. at 1810-1812).

{¶96} Spill Over Doctrine

{¶97} Brenson argues, in essence, that the evidence against Allen is more damaging than the evidence against him.

{¶98} In a case involving several defendants, the court must take care that evidence against one defendant is not misinterpreted by the jury and used as the basis for convicting another defendant not connected to the evidence. The existence of ... a "spill-over" or "guilt transference" effect turns in part on whether the numbers of conspiracies and conspirators involved were too great for the jury to give each defendant the separate and individual consideration of the evidence against him to which he was entitled. *United States v. Gallo* (6th Cir 1985), 763 F.2d 1504, 1526. (Citing *United States v. Tolliver* (2nd Cir 1976), 541 F.2d 958, 962). The primary concern is whether the jury will be able to segregate the evidence applicable to each defendant and follow the limiting instructions of the court as they apply to each defendant. *Opper v. United States*(1954), 348 U.S. 84, 95, 75 S.Ct. 158, 165; See, e.g., *Kotteakos v. United States*(1946), 328 U.S. 750, 766-74, 66 S.Ct. 1239, 1248-52,(number of defendants); *Blumenthal v. United States*(1947), 332 U.S. 539, 560, 68 S.Ct. 248, 257,(trial judge's instructions). *United States v. Flaherty* (1st Cir 1981), 668 F.2d 566, 582; *United States v. Causey* (6th Cir. 1987), 834 F.2d 1277.

{¶99} The phrase "prejudicial to the rights of the accused" means something more than that a joint trial will probably be less advantageous to the accused than separate trials. Such a party must show more than that a separate trial would have given him a better chance for acquittal. *United States v. Gallo*, supra at 1526. The United States Supreme Court has stated, "a district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific

trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro v. United States* (1993), 506 U.S. 534, 539, 113 S.Ct. 933.

{¶100} The violation of one of his substantive rights by reason of the joint trial include: unavailability of full cross-examination, lack of opportunity to present an individual defense, denial of Sixth Amendment confrontation rights, lack of separate counsel among defendants with conflicting interests, or failure properly to instruct the jury on the admissibility of evidence as to each defendant. See *United States v. Camacho* (9th Cir) 528 F.2d 464, 470, cert. denied, 429 U.S. 995, 96 S.Ct. 2208, 48 L.Ed.2d 819 (1976); United States v. Fernandez (9th Cir. 2004), 388 F.3d 1199, 1241.

{¶101} It is difficult to meet this burden by claiming that the jury probably considered evidence against one defendant that was introduced only against another: "juries are presumed to be capable of following instructions regarding the sorting of evidence and the separate consideration of multiple defendants." *United States v. Franklin* (6th Cir 2005), 415 F.3d 537, 556 (citations omitted).

{¶102} Even where the risk of prejudice is high, "less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice." *Zafiro v. United States*, supra. Indeed, "[a] request for severance should be denied if a jury can properly compartmentalize the evidence as it relates to the appropriate defendants." *United States v. Causey* (6th Cir. 1987), 834 F.2d 1277, 1287. Thus, to prevail on his severance argument, an appellant must show "compelling, specific, and actual prejudice from [the] court's refusal to grant the motion to sever." *United States v. Saadey* (6th Cir

2005), 393 F. 3d 669, 678; United *States v. Driver* (6th Cir. 2008), 535 F.3d 424, 427; Crim.R. 14.

{¶103} In the case at bar Brenson failed to establish specific and actual prejudice.

{¶104} In the case at bar, before deliberations, the trial court specifically admonished the jury that "Evidence may be admitted against one defendant, even though it must not be considered as evidence against the other defendant. You must carefully separate such evidence and consider it only as to the defendant to whom it applies. A statement by one defendant made outside the presence of the other defendant is admissible as to the defendant making such statement and must not be considered for any purpose as evidence against the other defendant.

{¶105} "You must decide separately the question of whether one or both defendants are guilty or not guilty. If you cannot agree on a verdict as to both defendants, but do agree as to one, you must render a verdict as to the one upon whose guilty or not guilty finding you agree." (17T. at 2588).(See also Judgment Entry Denying Defendant Allen's Motion for Relief From Prejudicial Joinder (Motion #30) and Defendant Brenson's Motion to Sever Trial (Motion #29), filed May 23, 2008 at 9).

{¶106} Brenson does not challenge the clarity of these instructions. These instructions sufficed to cure any possibility of prejudice. *Zafiro,* supra 506 U.S. at 450, 113 S.Ct. at 939.

{¶107} In *Bruton v. United States* (1968), 391 U.S. 123, 135-136, 88 S.Ct. 1620, 20 L.Ed.2d 476, the United States Supreme Court noted:

{¶108} "* * * Not every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions; instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently. "A defendant is entitled to a fair trial but not a perfect one." * * * It is not unreasonable to conclude that in many such cases the jury can and will follow the trial judge's instructions to disregard such information."

{¶109} "A presumption always exists that the jury has followed the instructions given to it by the trial court," *Pang v. Minch* (1990), 53 Ohio St.3d 186, 187, 559 N.E.2d 1313, at paragraph four of the syllabus, rehearing denied, 54 Ohio St.3d 716, 562 N.E.2d 163, approving and following *State v. Fox* (1938), 133 Ohio St. 154, 12 N.E.2d 413; *Browning v. State* (1929), 120 Ohio St. 62, 165 N.E. 566. Brenson has not cited any evidence in the record that the jury failed to follow the trial court's instruction.

{¶110} "[A] defendant is not entitled to a severance simply because the evidence against a co-defendant is far more damaging than the evidence against him. As we noted in *United States v. Warner,* 690 F.2d 545, 553 (6th Cir.1982): 'We recognize that, in a joint trial, there is always a danger that the jury will convict on the basis of the cumulative evidence rather than on the basis of the evidence relating to each defendant. However, we adhere to the view, as previously stated by our court, that '[t]he jury must be presumed capable of sorting out the evidence and considering the case of each defendant separately.' Id. (citations omitted). The presentation of evidence applicable to more than one defendant is simply a fact of life in multiple defendant cases." *Driver*, supra 535 F.3d at 427. (Quoting *Causey,* supra 834 F.2d at 1288).

{¶111} Brenson concedes “the vast majority of the evidence focused on Brenson and his activities”; however he claims that, “the most incriminating piece of evidence was exclusively related to Allen [, i.e.] the DNA on the bloody glove, which was the only evidence that directly tied either defendant to the murder”. [Appellant’s Brief at 39].

{¶112} In this case, we find that Brenson did not meet his burden of demonstrating specific and actual prejudice because of the admission of this evidence in a joint trial with Allen. There was no evidence that the jury was not able to heed the trial court's instruction to consider separately the evidence against each defendant, and Brenson failed to establish that a specific trial right was compromised because of this evidence. The appellant bears the burden of making a strong showing of factually specific and compelling prejudice resulting from a joint trial. *United States v. Lloyd*, (6th Cir. 1993), 10 F.3d 1197, 1215-1216; *United States v. Warner*, supra 971 F.2d at 1196. Brenson makes only a generalized argument with no factually specific and compelling prejudice argued or demonstrated by the record.

{¶113} In addition, the DNA evidence cited by Brenson was relevant and admissible against him in a separate trial[8]. Brenson overlooks the fact that the jury was instructed on complicity. (17T. at 2587). R.C. 2923.03 provides: "(A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:

{¶114} “* * *

{¶115} "(2) Aid or abet another in committing the offense."

[8] Evidence that Brenson and Herrell met while in prison was not objected to at trial. (14T. at 1983-1984). Accordingly, Brenson has waived all but plain error. *State v. Grubb* (1986), 28 Ohio St.3d 199, 203,503 N.E.2d 142; *Puckett v. United States* (2009), 129 S.Ct. 1423, 1428, 173 L.Ed.2d 266. omitted).

{¶116} R.C. 2923.03(F) states, "A charge of complicity may be stated in terms of this section, or in terms of the principal offense."

{¶117} “The Supreme Court of Ohio clarified Ohio's position on the issue of complicity in *State v. Perryman* (1976), 49 Ohio St. 2d 14,vacated in part on other grounds sub nom, *Perryman v. Ohio* (1978), 438 U.S. 911. The court unequivocally approved of the practice of charging a jury regarding aiding and abetting even if the defendant was charged in the indictment as a principal. Id. The court held that the indictment as principal performed the function of giving legal notice of the charge to the defendant. Id. Therefore, if the facts at trial reasonably supported the jury instruction on aiding and abetting, it is proper for the trial judge to give that charge. *Perryman,* supra at 27, 28.” *State v. Payton* (April 19, 1990), 8th Dist. Nos. 58292, 58346.

{¶118} R.C. 2923.03(F) adequately notifies defendants that the jury may be instructed on complicity, even when the charge is drawn in terms of the principal offense. See *State v. Keenan* (1998), 81 Ohio St.3d 133, 151, 689 N.E.2d 929, 946, citing *Hill v. Perini* (C.A.6, 1986), 788 F.2d 406, 407- 408. *State v. Herring* (2002), 94 Ohio St.3d 246, 251 762 N.E.2d 940, 949.

{¶119} "[To] support a conviction for complicity by aiding and abetting pursuant to R.C. 2923.03(A)(2), the evidence must show that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal ." *State v. Johnson* (2001), 93 Ohio St.3d 240, 754 N.E.2d 796, syllabus.

{¶120} Although the state need not establish the principal's identity, it must, at the very least, prove that a principal committed the offense. *State v. Perryman* (1976),

49 Ohio St.2d 14, 358 N.E.2d 1040, paragraph four of the syllabus; *State v. Hill* (1994), 70 Ohio St.3d 25, 28, 635 N.E.2d 1248, 1251. However, the state does not need to prove that the accomplice and principal had a specific plan to commit a crime. *Johnson,* 93 Ohio St.3d at 245, 754 N.E.2d 796. The fact that the defendant shares the criminal intent of the principal may be inferred from the circumstances surrounding the crime, which may include the defendant's presence, companionship, and conduct before and after the offense is committed. *Id.* at 245-246, 754 N.E.2d 796. This is a situation where "[c]ircumstantial evidence and direct evidence inherently possess the same probative value," *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph one of the syllabus, because "[t]he intent of an accused person dwells in his mind. Not being ascertainable by the exercise of any or all of the senses, it can never be proved by the direct testimony of a third person, and it need not be." *In re Washington,* 81 Ohio St.3d 337, 340, *1998-Ohio-627,* quoting *State v. Huffman* (1936), 131 Ohio St. 27, 1 N.E.2d 313, paragraph four of the syllabus.

{¶121} Accordingly, because Brenson could be found guilty of aiding and abetting Allen in the commission of the crimes with which he was charged, and vice versa, evidence relating to Allen is relevant to Brenson's trial and would be admissible in a separate trial. Evidence that Allen's DNA was found at the scene would be non-testimonial and admissible.

{¶122} DNA samples have been held to be non-testimonial evidence with respect to the Fifth Amendment privilege against self-incrimination. *State v. Bruce*, Fairfield App. No. 2006-CA-45, 2008-Ohio-5709 at ¶ 48. A DNA sample obtained from a state prisoner, pursuant to Ohio statute requiring the collection of DNA specimens from

convicted felons, was physical, rather than testimonial evidence, and thus did not implicate the prisoner's Fifth Amendment privilege against self-incrimination. *Wilson v. Collins* (C.A.6, 2008), 517 F.3d 421, 431. The Court reasoned that a DNA sample was analogous to a photograph or fingerprint identifying an individual. *Id.* (Citing *United States v. Zimmerman,* 514 F.3d 851, 853 (9th Cir.2007) (citing *Schmerber v. California,* 384 U.S. 757, 765, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966) (holding that "blood test evidence, although an incriminating product of compulsion, [is] neither [ ] testimony nor evidence relating to some communicative act or writing" and is therefore not protected by the Fifth Amendment)).

{¶123} Evidence that an accomplice and principal were acting together can be shown by evidence the accomplice accompanied the principal to the scene of the crime. *State v. Johnson*, supra 93 Ohio St.3d at 244, 754 N.E.2d 800; *State v. Jones* (Sept. 20, 2001), 8th Dist. No. 78545; State v. Rodriguez (May 17, 2000), 9th Dist. No. 98CA007255; *In re Moore* (Feb. 3, 2000), 8th Dist. No. 75673. Finding Allen's DNA in the general vicinity of Brenson's fingerprints and a blood soaked glove in the home of the victim could support an inference that Brenson supported, assisted, encouraged, and cooperated with Allen in the commission of the crimes[9].

{¶124} In the case at bar, the evidence against Allen was easily identifiable and capable of being separately identified and compartmentalized by the jury. We find that Brenson did not meet his burden of demonstrating compelling, specific, and actual prejudice because of the admission of Allen's DNA evidence in Brenson's joint trial with Allen. The mere fact that there "is a substantial difference in the amount of evidence

[9] Evidence concerning the search and inventory of Brenson's vehicle was stricken by the court and the jury was instructed to disregard such evidence. This evidence is more fully addressed in relation to appellant's seventh assignment of error, infra.

adduced against each defendant ... is not grounds to overturn a denial of severance unless there is a substantial risk that the jury could not compartmentalize or distinguish between the evidence against each defendant." *Clark v. O'Dea,* 257 F.3d 498, 504 (6th Cir. 2001) (*quoting United States v. Lloyd,* 10 F.3d 1197, 1215 (6th Cir. 1993)). Moreover, this case, while lengthy, was not a case of such complexity that the jury could not compartmentalize the evidence. *United States v. Lloyd*, supra 10 F.3d at 1216. We do not think there was any significant danger of jury confusion, let alone such a danger as would warrant a severance.

{¶125} We decline to hold that a separate trial is necessary whenever any potentially incriminating evidence against one codefendant is introduced during a joint trial. See *Richardson v. Marsh,* supra, 481 U.S. at 209-10, 107 S.Ct. 1702. In the absence of a showing to the contrary, the jury is presumed to have followed the instructions of the court. *State v. Negron,* supra, 221 Conn. at 331, 603 A.2d 1138; see also *Richardson v. Marsh,* supra, at 206, 107 S.Ct. 1702. The mere fact that there "is a substantial difference in the amount of evidence adduced against each defendant ... is not grounds to overturn a denial of severance unless there is a substantial risk that the jury could not compartmentalize or distinguish between the evidence against each defendant." *Clark v. O'Dea,* 257 F.3d 498, 504 (6th Cir. 2001) (*quoting United States v. Lloyd,* 10 F.3d 1197, 1215 (6th Cir. 1993)). Moreover, this case, while lengthy, was not a case of such complexity that the jury could not compartmentalize the evidence. *United States v. Lloyd*, supra 10 F.3d at 1216. We do not think there was any significant danger of jury confusion, let alone such a danger as would warrant a severance.

{¶126} As such, we conclude that the danger of prejudice due to the "spillover" of evidence is insufficient to justify severance for Brenson.

{¶127} Because Brenson has not shown that his joint trial subjected him to any legally cognizable prejudice, we conclude that the trial court did not abuse its discretion in denying Brenson's motion for severance. *Zafiro,* supra 506 U.S. at 450, 113 S.Ct. at 939.

{¶128} Accordingly, Brenson's third assignment of error is overruled.

IV.

{¶129} In his fourth assignment of error, Brenson argues that his testimony before the grand jury was obtained in violation of his right to counsel and that such testimony should have been suppressed. Specifically, Brenson claims that when formal charges were brought against him and an arrest warrant was issued by the Delaware Municipal Court on the charges, he was no longer simply a "suspect" but instead had become an "accused" for purposes of the Sixth Amendment. Brenson also claims that any waiver of his rights to counsel regarding his testimony before the Grand Jury was not knowingly, voluntarily, or intelligently made because he was not informed of the arrest warrant and that, as a result, his statements should have been suppressed. We disagree.

{¶130} On June 6, 2008, Brenson filed a Motion to Dismiss Indictment or Suppress Statements (Motion #36). The state filed a memorandum contra on June 13, 2008. By Judgment Entry filed July 2, 2008, the trial court overruled the motion.

{¶131} On June 17, 2008, Brenson, along with his counsel, and the State of Ohio entered into the following joint stipulations relating to Brenson's Motion to Dismiss

Indictment or Suppress Statements. On April 15, 2008 at 8:01 a.m., a complaint was filed in the Delaware Municipal Court charging James A. Brenson with the crime of aggravated murder with a repeat violent offender specification. The complaint specifically alleged that: "On or about June 12, 2000, James A. Brenson, Jr. did in conjunction with another person(s), purposely, and with prior calculation and design, cause the death of Norman E. Herrell. Norman E. Herrell was bound and stabbed multiple times." [Joint Stipulations, Ex. A]. The complaint was sworn to by Sergeant Mark Leatherman. Also on April 15, 2008 at 8:01 a.m., a precipe for service was filed for the issuance of a warrant against James A. Brenson in the Delaware Municipal Court. Both Sergeant Mark Leatherman and Kyle Rohrer, Assistant Prosecuting Attorney signed the precipe. Joint Stipulations [Ex. B.]. On April 15, 2008 at 8:10 a.m., a warrant was issued by the Delaware Municipal Court. The warrant was signed by Judge David Gormley and ordered the arrest of James A. Brenson without unnecessary delay. The return on the warrant indicates that Sergeant Mark Leatherman received it on April 15, 2008 at 8:15 a.m. [Joint Stipulations, Ex. C].

{¶132} The parties further stipulate that on April 15, 2008, commencing at approximately 9:12 a.m., Brenson appeared before the Delaware County Grand Jury and provided testimony. A copy of the transcript of Brenson's testimony has been provided to the trial court, in its entirety. State's Ex. 1. Brenson was neither served with the warrant, nor advised of the charges in the complaint prior to testifying before the Grand Jury on April 15, 2008.

{¶133} It is firmly established that a defendant has the right to counsel, pursuant to the Sixth and Fourteenth Amendments, at or after the time that adversary judicial

proceedings have been initiated against him, whether by way of formal charge, preliminary hearing, indictment, information, or arraignment. *Kirby v. Illinois* (1972), *406* U.S. *682, 689.* The defendant is afforded this right to counsel regardless of whether he is in custody. *Brewer v. Williams* (1977), *430* U.S. *387.* In the case at bar, the trial court determined that Brenson had the right to have the assistance of counsel when the formal complaint and arrest warrant were issued against him in this case.

{¶134} The trial court noted that Brenson was not subpoenaed to appear before the grand jury; rather he appeared at the grand jury in response to a letter inviting him to testify.

{¶135} The trial court further found that the grand jury transcript established that Brenson was given *Miranda* warnings at the outset of his questioning. Brenson "was advised by the prosecuting attorney that he had a right not to give testimony before the Grand Jury and that if he chose to testify he was waiving his right against self-incrimination. (Brenson Grand Jury Tr. *3,* April 15, 2008*.)* Brenson was also advised that he had a right to consult with an attorney and that if he could not afford an attorney, the Court may appoint him one. Id. Brenson affirmatively waived his right to an attorney for the purpose of Grand Jury. Id. The prosecuting attorney also advised Brenson that anything discussed during the Grand Jury proceedings could be used against him "in a court of law some day." Id*.*" [Judgment Entry Denying Defendant Brenson's Motion to Dismiss Indictment or Suppress Statements (Motion #36), filed July 2, 2008 at 5]. [Hereinafter cited as "J.E. Motion #36"]. Brenson affirmatively indicated that he understood this consequence of testifying before the Grand Jury. Id.

{¶136} The question of an effective waiver of a Federal Constitutional right in a State criminal proceeding is governed by Federal standards. *Boykin v. Alabama* (1969), 395, U.S. 238. (Citing *Douglas v. Alabama* (1965) 380 U.S. 415). For a waiver to be valid under the Due Process clause of the United States Constitution, it must be: "[a]n intentional relinquishment or abandonment of a known right or privilege." *Boykin*, supra, 395 U.S. at 243 n. 5 (Quoting *Johnson v. Zerbst* (1938), 304 U.S. 458).

{¶137} The Sixth Amendment guarantees to criminal defendants the right to counsel in post indictment interviews with law enforcement authorities. *Massiah v. United States (*1964*),* 377 U.S. 201, 205-07. Unlike the right to counsel secured under the Fifth Amendment, the Sixth Amendment right to counsel comes into existence regardless of whether the defendant is in custody, so long as adverse judicial proceedings have been initiated against him. *See Patterson v. Illinois* (1988*),* 487 U.S. 285, 290, 298-99.

{¶138} Once a suspect against whom such proceedings have begun indicates his desire for the assistance of counsel, the authorities must cease interrogation, and any further questioning on the crime for which the defendant was indicted is forbidden unless counsel is present. *McNeil v. Wisconsin* (1991*),* 111 S.Ct. 2204, 2207-08 (1991). As clarified in *Patterson,* however, the initiation of adverse judicial proceedings does not erect an absolute bar to post indictment police interrogation in the absence of counsel; rather, a defendant may be questioned where he knowingly and intelligently waives his right to counsel, thus establishing " 'an intentional relinquishment or abandonment of a known right or privilege.'" *Patterson,* 487 U.S. at 292 (quoting *Johnson v. Zerbst* (1938*),* 304 U.S. 458, 464.). In *Patterson,* the Supreme Court

further held that advising a defendant of his right to counsel by means of *Miranda* warnings establishes that the ensuing waiver is knowing and intelligent, “As a general matter, ... an accused who is admonished with the warnings prescribed by this Court in *Miranda* has been sufficiently apprised of the nature of his Sixth Amendment rights, and of the consequences of abandoning those rights, so that his waiver on this basis will be considered a knowing and intelligent one.” Id. at 296 (citation omitted).

{¶139} The Supreme Court has declined to resolve explicitly the question of whether the Sixth Amendment requires a defendant to be informed, before questioning, that he or she has been indicted. *Patterson,* 487 U.S. at 295 n. 8. ("we do not address the question whether or not an accused must be told that he has been indicted before a post indictment Sixth Amendment waiver will be valid. Nor do we even pass on the desirability of so informing the accused--a matter that can be reasonably debated.").

{¶140} In *United States v. Washington* (1977), 431 U.S. 181, 97 S.Ct. 1814 the United States Supreme Court ruled that where a grand jury witness was advised of and waived his right to remain silent, his incriminating testimony could be used against him in a later criminal prosecution, even though defendant was unaware that he was under suspicion. The Court stated, “Because target witness status neither enlarges nor diminishes the constitutional protection against compelled self-incrimination, potential-defendant warnings add nothing of value to protection of Fifth Amendment rights. 431 U.S. at 189, 97 S. Ct. 1819. ." *See also United States v. Myers* (6th Cir 1997), 123 F.3d 350; *United States v. Gillespie* (7th Cir.1992), 974 F.2d 796, 800 ("[The defendant] concedes--as he must--that target warnings are not constitutionally mandated.") (citing *Washington, 431 U.S. at 189, 97 S.Ct. at 1819); United States v. Goodwin*(9th Cir.

1995), 57 F.3d 815, 818 (same); *United States v. Pacheco-Ortiz*(1st Cir. 1989), 889 F.2d 301, 307 (1st Cir. 1989) (same).

{¶141} In *Moran v. Burbine* (1986) *475* U.S. 412,106 S.Ct. 1135, a case arising under the Fifth Amendment, the Court stated, “But we have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights. See, *e.g., Oregon v. Elstad,* 470 U.S. 298, 316-317, 105 S.Ct. 1285, 1296-1297, 84 L.Ed.2d 222 (1985); *United States v. Washington,* 431 U.S. 181, 188, 97 S.Ct. 1814, 1819, 52 L.Ed.2d 238 (1977). Cf. *Hill v. Lockhart,* 474 U.S. 52, 56, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); *McMann v. Richardson,* 397 U.S. 759, 769, 90 S.Ct. 1441, 1448, 25 L.Ed.2d 763 (1970). Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law. The Court of Appeals' conclusion to the contrary was in error.” Id. at 422-423, 106 S.Ct. 1141. (Footnote omitted).

{¶142} In the case at bar, the trial court found, “Brenson knew that any statement that he made could be used against him in subsequent criminal proceedings. Since Brenson knew what could be done with any statement he might make, and therefore, what benefit could be obtained by having the aid of counsel while making such statements, Brenson was essentially informed of the possible consequences of forgoing the aid of counsel. In fact, the transcript of Brenson's Grand Jury testimony reveals that

Brenson had consulted with counsel prior to appearing before the Grand Jury. (Brenson Grand Jury Tr. 5.).” [J.E. Motion #36 at 7].

{¶143} Additionally, Brenson was aware of the nature of the charges and his suspected involvement in the offenses. Brenson had previously been indicted, arraigned, consulted counsel, and engaged in discovery prior to the dismissal of the previous indictment. Further, Brenson was not compelled to appear before the grand jury; rather he did so of his own free will.

{¶144} On three separate occasions, once before the grand jury in 2002, once in a police interview in 2003, and again before the grand jury in 2008, Brenson elected to waive representation and speak with the police or the prosecutor regarding his involvement in the murder of Norman Herrell. Because we believe that Brenson’s waiver of his right to counsel was knowing, voluntary, and intelligent, we find no error in the trial court’s decision not to suppress his statements.

{¶145} Brenson’s fourth assignment of error is overruled.

V.

{¶146} In his fifth assignment of error, Brenson claims that the prosecution abused the grand jury process by failing to tell Brenson that charges had already been filed against him prior to his 2008 appearance before the grand jury. We disagree.

{¶147} In support of this contention, Brenson cites to the Sixth Circuit case of *U.S. v. Doss* (6th Cir. 1977), 563 F.2d 265, which held that subpoenaing a defendant to

testify before the grand jury after an indictment had been filed against him amounted to prosecutorial abuse that violated the defendant's due process rights. The *Doss* court held, "where a substantial purpose of calling an indicted defendant before a grand jury is to question him secretly and without counsel present without his being informed of the nature and cause of the accusation about a crime for which he stands already indicted, the proceeding is an abuse of process which violates both the Sixth Amendment and the due process clause of the Fifth Amendment." Id. at 276.

{¶148} In *Doss,* the Court noted, " 'the government may not in the absence of an intentional and knowing waiver call an indicted defendant before a grand jury and there interrogate him concerning the subject matter of a crime for which he stands already indicted.' "United *States v. Doss* 563 F.2d at 277 (quoting *United States v. Mandujano* [1976], 425 U.S. 564, 594, 96 S.Ct. 1768, 1785, 48 L.Ed.2d 212, 233 [Brennan, J., concurring]).

{¶149} We find *Doss* to be distinguishable from the facts in the present case. In *Doss*, the defendant was commanded to appear before the grand jury via subpoena. Such was not the case with Brenson. Brenson was invited to appear before the grand jury. As noted in our discussion of Brenson's fourth assignment of error, Brenson was under no compulsion to either appear or answer questions before the grand jury.

{¶150} Second, on three separate occasions, once before the grand jury in 2002, once in a police interview in 2003, and again before the grand jury in 2008, Brenson elected to waive representation and speak with the police or the prosecutor regarding his involvement in the murder of Norman Herrell. Because we believe that Brenson's

waiver of his right to counsel was knowing, voluntary, and intelligent, we found that the *Miranda* warnings suffice to protect Brenson's rights during post indictment question.

{¶151} Accordingly, as Brenson intentionally and knowingly waived his Fifth and Sixth Amendment rights, we find the trial court did not err in overruling Brenson's Motion #36.

{¶152} Accordingly, Brenson's fifth assignment of error is overruled.

VI.

{¶153} Brenson argues in his sixth assignment of error that his right to an impartial jury was denied when the trial court refused to dismiss two jurors who had been exposed to pretrial publicity regarding his case. We disagree.

{¶154} The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires that a defendant accused of a state criminal violation shall be tried before a panel of fair and impartial jurors. See *Duncan v. Louisiana* (1968), 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491, and *State v. King* (1983), 10 Ohio App.3d 161, 460 N.E.2d 1383. See, also, Section 10, Article I, Ohio Constitution.

{¶155} "[I]n extraordinary cases, where the trial atmosphere has been utterly corrupted by press coverage, a court must presume that pre-trial publicity has engendered prejudice in the members of the venire." *Williams v. Bagley* (6th Cir 2004), 380 F.3d 932, 945 (internal citation and quotation marks omitted). However, "mere prior knowledge of the existence of the case, or familiarity with the issues involved, or even some preexisting opinion as to the merits, does not in and of itself raise a presumption of jury taint." *DeLisle v. Rivers* (6th Cir 1998) (en banc), 161 F.3d 370, 382.

{¶156} “Pretrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial.” *Nebraska Press Assn.* v. *Stuart* (1976), 427 U. S. 539, 554.

{¶157} A trial judge is empowered to exercise "sound discretion to remove a juror and replace him with an alternate juror whenever facts are presented which convince the trial judge that the juror's ability to perform his duty is impaired." *State v. Hopkins* (1985), 27 Ohio App.3d 196, 198, 500 N.E.2d 323, citing *United States v. Spiegle* (C.A.5, 1979), 604 F.2d 961, 967; *State v. Sikola*, Richland App. No. 06CA72, 2008-Ohio-843 at ¶ 39. Put differently, the court has authority to replace jurors with alternates when the jurors "become or are found to be unable or disqualified to perform their duties." Crim.R. 24(F); see, also, R .C. 2945.29. The trial court has discretion to determine when the appropriate alternate should replace a reportedly disabled juror before deliberations begin. *State v. Sallee* (1966), 8 Ohio App.2d 9, 220 N.E.2d 370. Absent a record showing that the court abused that discretion which resulted in prejudice to the defense, the regularity of the proceedings is presumed. *Beach v. Sweeney* (1958), 167 Ohio St. 477, 150 N.E.2d 42. See also, *State v. Shields* (1984), 15 Ohio App.3d 112, 472 N.E.2d 1110.

{¶158} The test for prospective jurors is not whether they have views on the subject matter involved; the test is whether their views will impair their judgment to the extent that they would not be able to faithfully and impartially determine facts and apply law according to instruction of the trial court. *Dayton v. Gigandet* (1992), 83 Ohio App.3d 886, 891-892, 615 N.E.2d 1131, 1134-1135. “’Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is

not chained to any ancient and artificial formula.'" *Dennis v. United States*(1950), 339 U.S. 162, 172, 70 S.Ct. 519, 523.(Quoting *United States v. Wood*, 299 U.S. 123, 145-146, 57 S.Ct. 177, 185).

{¶159} When pretrial publicity is at issue, moreover, "primary reliance on the judgment of the trial court makes [especially] good sense" because the judge "sits in the locale where the publicity is said to have had its effect" and may base her evaluation on her "own perception of the depth and extent of news stories that might influence a juror." *Mu'Min v. Virginia* (1991), 500 U. S. 415, 427.

{¶160} Brenson's cause for concern regarding Juror Sakich arose from the following exchange during voir dire:

{¶161} "Mr. Heald: . . . When I was looking through these questionnaires, yours had . . . indicated that you had gone on the internet and looked at the case?

{¶162} "Ms. Sakich: No. I did a search on the web or whatever and there was a little thing that let me know that somebody was killed, but that was it.

{¶163} "Mr. Heald: So what you're indicating is that that is the extent of your outside knowledge or knowledge that you've come here today . . . about this case?

{¶164} "Ms. Sakich: Yes. I filled the questionnaires out on my lunch hour at work. At home I watch the Disney Channel or Sports."

{¶165} The trial court, in the voir dire of Juror Sakich, elicited the following information regarding her ability to be impartial:

{¶166} "The Court: Okay. So you feel that you could be fair and impartial in this case to all parties?

{¶167} "Ms. Sakich: Yes."

{¶168} Regarding Juror Ames, the trial court examined her on her ability to be impartial:

{¶169} "The Court: And was there anything about what [a former student] said to you that would make it difficult for you to be a fair and impartial juror in this case?

{¶170} "Ms. Ames: No, because I don't know the facts.

{¶171} "The Court: And was there anything that would indicate to you that your former student knew anything about the facts of this case?

{¶172} "Ms. Ames: I think it was just basically what she was told or what she heard.

{¶173} "The Court: And do you recognize the need to have critical decisions made based on sworn testimony in a court of law?

{¶174} "Ms. Ames: I do.

{¶175} "The Court: And are you willing to make a fair and impartial decision based on that in this case?

{¶176} "Ms. Ames: Yes.

{¶177} "The Court: Okay, so what I'm hearing is that you haven't made any judgments about either of these defendants sitting here today?

{¶178} "Ms. Ames: Right."

{¶179} Neither juror indicated an inability to be impartial, nor did either juror indicate that publicity regarding the case caused her to presume the guilt of either defendant. Each juror stated that they were able to be impartial in the case.

{¶180} The Ohio Supreme Court further noted, "The record shows that the voir dire on pretrial publicity was comprehensive. The trial court asked the prospective jurors

whether any of them knew about the case through firsthand information or media coverage. The trial court then asked prospective jurors who had indicated some familiarity with the case whether they could lay aside what they had heard and decide the case solely upon the evidence presented at trial. Counsels were then given the opportunity to fully question the prospective jurors about their exposure to pretrial publicity. Following thorough questioning, the trial court excused members of the venire who had formed fixed opinions due to pretrial publicity or were otherwise unsuitable." Id. at 45. This is substantially the same procedure that the trial court utilized in the Brenson's case.

{¶181} The trial court's decision not to exclude Sakich and Ames was not arbitrary, but was supported by substantial testimony. We find that Brenson has failed to overcome the presumption that the trial court correctly ruled on Brenson's' request or demonstrate that the trial court abused its discretion.

{¶182} We find that the trial court did not abuse its discretion in declining to remove either Juror Sakich or Juror Ames for cause.

{¶183} Brenson's' sixth assignment of error is overruled.

VII.

{¶184} In his seventh assignment of error, Brenson claims that the trial court abused its discretion in failing to grant a mistrial on two separate occasions after the jury was exposed to what Brenson asserts was prejudicial information.

{¶185} Brenson first argues that the trial court abused its discretion in failing to grant a mistrial after the prosecutor called Silvy Allen to the stand in its case in chief.

{¶186} Specifically, the facts giving rise to the motion for mistrial were as follows: The State had failed to successfully serve Silvy Allen with a subpoena prior to trial. After the trial had commenced, the prosecutor served Mrs. Allen with a subpoena when she accompanied her daughter to the courthouse to testify. During trial, in front of the jury, the prosecutor proceeded to call Mrs. Allen to the stand to testify. After she took the stand, the prosecutor asked the court if counsel could approach. At a sidebar conference, the following exchange was held:

{¶187} "[Prosecutor]: Your Honor, we are approaching prophylacticlly [sic], a thought had occurred that the witness might say at some point that she wished not to testify. Your honor, perhaps we should ask that question when the jury is not present. There is a privilege in this case although they weren't married until 2005, well after the murder, but anything we're asking her about was before they were married, not during covatures. [sic]"

{¶188} "The Court: Well, I think we should probably address it before.

{¶189} ""[Prosecutor]: There's a competency issue that I don't want to come up in front of the jury.

{¶190} "The Court: Okay. I'll excuse the jury and we can address it.* * *"

{¶191} The following then occurred after the jury was dismissed from the courtroom and the witness was sworn:

{¶192} "The Court: Be seated, folks.

{¶193} "The Court: Do you want to inquire?

{¶194} ""[Prosecutor]: Your honor, my understanding of the case law in this area, I think it would be appropriate for the court to ask questions of the witness regarding Evidence Rule 601

{¶195} "The Court: Your name is Silvy Allen; is that right?

{¶196} "A: Silvy Sparks Allen.

{¶197} "Q: Silvy Sparks Allen?

{¶198} "A: Right.

{¶199} "* * *

{¶200} "Q: And you're currently married to Mr. William T. Allen, who is one of the defendants in this case?

{¶201} "A: That's correct.

{¶202} "Q: And when were you married?

{¶203} "A: I'm sorry. Under my stress I'm not going to be totally accurate. Maybe three years ago.

{¶204} "Q: This is 2008. So 2005 sometime?

{¶205} "A: Yes.

{¶206} "Q: And it's my understanding that you're electing to testify today; is that right?

{¶207} "A: No. And I'm also going to plead the fifth because I wish not to testify against my husband. This subpoena was just given to me momentarily ago. I accompanied my daughter who was subpoenaed.

{¶208} "Q: Okay. So you refuse to testify?

{¶209} "A: That's correct.

{¶210} "The Court: All right, what's your position on this, Mr. "[Prosecutor]?

{¶211} ""[Prosecutor]: Your Honor, the strictures of Evidence Rule 601, I think, are pretty clear. I don't know that there's much leeway in this. I guess the only argument I would make - - having reviewed the case law, there's really no good faith argument I can make contrary to that, your honor. The competence issue applies at the time the witness is testifying, which is now and we have no reason to believe they're not married.

{¶212} "The Court: All right. Any statements for the regard (sic) on behalf of Mr. Allen?

{¶213} "Mr. Heald: No, your Honor.

{¶214} "The Court: All right, ma'am. You can step down.

{¶215} "* * *

{¶216} "Mr. Meyers: * * * We would, in retrospect, lodge an objection to what just transpired here, whereby if the government was aware, as obviously they were, that this witness was going to exercise her right not to testify, they should have brought that to the court's attention before parading her onto the stand. I'm sure I wasn't the only one in the room who watched everybody carefully watching her and now, obviously, they've implied, improperly that for some reason, I suppose not of their own making, they've sent the signal by just her physical presence that she's refused to testify. It's inappropriate and we object and move for a mistrial. It's no different than calling a witness you know who is going to take the Fifth and playing that hand in front of the jury.

{¶217} "Mr. Heald: Your Honor, we would join in the objection in that motion.

{¶218} "The Court: Does the State want to respond to the objection and motion?

{¶219} ""[Prosecutor]: Your Honor, that's the exact reason I approached the bench before we asked the witness any questions, to address that issue because it popped up. We only served her with her subpoena about five minutes ago.

{¶220} "Mr. Meyers: Clearly, the State must have heard something out in that hallway that caused them to approach the bench. Why they waited until after they had the little parade or charade is inappropriate.

{¶221} "The Court: I was kind of curious about that myself.

{¶222} ""[Prosecutor]: Your Honor, Mr. Mooney was in the hallway and had a conversation with the witness prior to that, too, and it wasn't raised by anyone else in the room except myself before the witnesses testified.

{¶223} "Mr. Meyers: We're certainly not privy to the conversations the government or its counsel or it's [sic] chief law enforcement agency has had with her. * * * We have known generally that they've been trying to serve Silvy Allen up in the Toledo area. If they've got a shot to protrusely [sic] drop an immediate subpoena on her and were apparently one or all total, all three together, state representative told by her, I'm not testifying, she most certainly has been paraded in front of this jury.

{¶224} ""[Prosecutor]: She didn't say that, your honor. She told us she was refusing to accept a subpoena. Until we found her person and got her served personally with the subpoena, we couldn't force it. But we found her, we served her with a subpoena and she was in court. I had no conversations with her, Miss O'Brien had no conversations with her, Sergeant Leatherman had no conversations with her today.

{¶225} "Now, the look on her face lead [sic] me to believe that we should approach the bench before her answering any questions. I said something to her about our fair city, she said, "I hate your fair city," or something to that effect. She did not tell me she did not want to testify."

{¶226} The court, in ruling on the motion for mistrial, stated as follows:

{¶227} "We have motions for mistrial pending on behalf of both defendants. I think it's the fourth motion for mistrial in this case, feeling that the substantial rights of their clients have been affected by the parading of Miss Allen in here in front of the jury. And then Miss Allen's refusal to testify. Certainly, I agree with counsel that a simple question by Mr. Rohrer, do you wish to testify or not, would have handled it and not brought her in, nor probably the calling of her name in the courtroom, that he was calling her as a witness. And I'm not sure that's akin to putting someone on the stand to plead the Fifth when the prosecutor knows that the witness was going to do that, although it comes pretty close. In this case, the jury was excused and outside the presence of the jury the witness said that she didn't want to testify.

{¶228} "You know, frankly the court should have anticipated that except I found myself in the same position, wondering if she was coming in the courtroom, then she must be willing to testify. But it's something that is required to do if the spouse is going to testify, to bring them in in advance and say, do you wish to testify; you have a right not to testify. Has substantial prejudice been shown? No, nor has counsel really stated what the substantial prejudiced this would be [sic] except what inference the jury may or may not take from the fact that she was called in in front of them and then she did not testify. The court is going to give an instruction to the jury and the instruction would

either be one that they are not to infer anything from the fact that Mr. Allen's wife refused to testify, or did not testify because our law says a spouse does not have to testify in a trial of her husband, if she so chooses, or the instruction would be that they are not to infer anything from the fact the witness was called to the stand and did not testify. So I can advise them of the law that allows her not to testify, or I can just tell them they're not to infer anything. With that instruction, first of all, I don't think there's any substantial prejudice here to the defendants, but certain the jury may infer something that they probably shouldn't and what the consequences of that is, no one knows."

{¶229} At the outset, we note the fact that a witness is under no obligation to speak with the attorney for the state or the attorney for the defense prior to trial[10]. Additionally, had the state called Allen's wife in an effort to create prejudice to Brenson's case, the prosecutor would simply have begun questioning her, forcing her to recite her refusal to testify in front of the jury, or placing damaging evidence under the guise of questioning in front of the jury.

{¶230} Of relevance to this assignment of error, the Ohio Supreme Court has noted that,

{¶231} "A witness, even though he has previously indicated that he will refuse to testify on the ground that to do so would incriminate him, may be called as a witness.

{¶232} "As stated in *State v. Snyder* (1953), 244 Iowa, 1244, 1248, 59 N.W. (2d), 223:

[10] "(I) n modern criminal trials, defendants (as well as prosecutors) are rarely able to select their witnesses: they must take them where they find them." *Chambers v. Mississippi* (1973), 410 U.S. 284, 296, 93 S.Ct. 1038, 1046, 35 L.Ed.2d 297.

{¶233} "'The general rule is, as stated in 58 Am.Jur. Witnesses, Section 53, that although a witness cannot be compelled to give incriminating testimony, he must if properly summoned appear and be sworn. His privilege is available only as a witness and cannot be extended so as to excuse him from appearing. If the witness himself cannot escape being sworn by claiming in advance that he will refuse to testify, certainly the defendant, against whom such witness is offered, cannot claim greater rights.' See, also, 8 Wigmore on Evidence, 402, Section 2268.

{¶234} "The possibility that a witness may claim the privilege does not prohibit the prosecutor from asking questions. *Commonwealth v. Granito,* [(1950), 326 Mass. 494]". *Columbus v. Cooper* (1990), 49 Ohio St.3d 42, 44-45, quoting *State v. Dinsio* (1964), 176 Ohio St. 460, 466. [Internal quotation marks omitted]. See also, *In re M.E.G.*, Franklin App. Nos. 06AP-1256, 06AP-1257, 06AP-1258, 06AP-1259, 06AP-1263, 06AP-1264, 06AP-1265, 2007-Ohio-4308 at ¶44. The *Dinsio* court stated that, in a criminal case where a witness properly invokes his right against self-incrimination under the Fifth Amendment, it is improper for the court to prohibit such a witness from being called to the stand, regardless of whether counsel knows that the witness will refuse to testify.

{¶235} We find that Brenson did not suffer any constitutional injury because of the procedure employed in this case. In order to establish a constitutional violation, Brenson must show that the prosecution used the witness's assertion of the privilege to create an inference that established a critical element of the state's case. *See Douglas v. Alabama* (1965), 380 U.S. 415, 419, 85 S.Ct. 1074.

{¶236} The seminal case concerning the refusal of a witness to testify during a criminal trial is *Namet v. United States* (1963), 373 U.S. 179, 83 S.Ct. 1151, 10 L.Ed.2d 278. In *Namet,* the United States Supreme Court outlined two theories that would support a finding of reversible error when a witness asserts his Fifth Amendment privilege. First, the Court stated that error may be based upon prosecutorial misconduct when the government "makes a conscious and flagrant attempt to build its case out of inferences arising from the use of the testimonial privilege." Id. Second, error may arise when, "in the circumstances of a given case, inferences from a witness' refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant." Id.

{¶237} In applying the two-pronged *Namet* test, courts have considered a number of factors including: the prosecutor's intent in calling the witness, the number of questions asked that elicit an assertion of the Fifth Amendment privilege, whether defense counsel objects to the prosecutor's conduct, whether the prosecutor attempts to draw adverse inferences in closing argument from the witness' refusal to testify, whether the witness is closely related to the accused, whether the allegedly adverse inferences drawn from an assertion of the testimonial privilege relate to central issues in the case or collateral matters, and whether the inference is the only evidence bearing upon the issue or is cumulative of other evidence. See *Namet,* supra; *Zeigler v. Callahan* (1981), 659 F.2d 254; *Douglas v. Alabama* (1964), 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934; *State v. Carballo* (Oct. 16, 1989), Madison App. No. CA88-02-006. The Court in *Namet* placed no duty on the prosecutor to determine in advance whether the witness would claim a testimonial privilege,

{¶238} "In the first place, the record does not support any inference of prosecutorial misconduct. It is true, of course, that [defense counsel] announced that the [witnesses] would invoke their testimonial privilege if questioned. But certainly the prosecutor need not accept at face value every asserted claim of privilege, no matter how frivolous."*Namet,* supra at 179, 188, 83 S.Ct. 1151, 1155.

{¶239} Here, the record is clear that the state did not improperly pose repeated questions seeking to place before the jury, under the guise of questioning, evidence that was prejudicial to the accused. Rather, the prosecutor upon realizing a problem might occur took the most prudent course of action and requested a side bar out of the hearing of the jury. Under these circumstances, there was no allusion to Ms. Allen's knowledge of the events or of Brenson's activities on the evening in question. Ms. Allen's appearance on the witness stand was very brief and her refusal to testify was addressed to the trial court. In the instant case, any inference that the jury may have made from Ms. Allen's refusal to testify not only would have been insufficient to establish a critical element of the state's case, but also would have been merely cumulative of the adequate evidence the state adduced to establish its case.

{¶240} Further, the court instructed the jury, "When you left, we had a witness on the stand. That witness was a Mrs. Allen, the spouse of Defendant Allen, and under the laws of our state, we have rules, evidence rules, and there's [sic] rules of competency. For example, a person of unsound mind can't testify; a child under the age of ten can't testify. Likewise, a spouse cannot testify. So once I determined she was the spouse, she was not permitted to testify." Brenson did not object to the trial court's curative

instruction at the time it was given, nor does he challenge the correctness or clarity of the curative instruction on appeal[11].

{¶241} In the case at bar, we believe the trial court's instruction correctly conveyed to the jury that Ms. Allen had a right not to testify and her decision not to testify must not be considered by the jury for any purpose. That is all the jury really needed to know. As the jury was not being asked to decide the issue of whether the witness had a right to claim a spousal privilege, or whether the spousal privilege applied under the circumstances, the trial judge was not required to give the jury an instruction on spousal privilege. Therefore, his failure to do so, or doing so incorrectly cannot be error.

{¶242} The instruction given by the trial court benefitted Allen and Brenson because the jury was not informed that, for example, Ms. Allen had a Fifth Amendment right to refuse to testify on the grounds that she may incriminate herself. Additionally, the jury was informed that it was not Ms. Allen's decision not to testify; rather she was prevented from testifying by law. We fail to see how the trial court's instruction affected his substantial rights and, in addition how the error seriously affect[ed] the fairness, integrity or public reputation of [the] judicial proceedings. *United States v. Olano* (1993), 507 U.S. at 725,734, 113 S.Ct. 1770; *State v. Perry* (2004), 101 Ohio St.3d 118, 120 802 N.E.2d 643, 646.

{¶243} As previously noted, "[a] presumption always exists that the jury has followed the instructions given to it by the trial court," *Pang v. Minch* (1990), 53 Ohio St.3d 186, 187, 559 N.E.2d 1313, at paragraph four of the syllabus, rehearing denied,

[11] Accordingly, appellant has waived all but plain error. *Puckett v. United States* (2009), 129 S.Ct. 1423, 1428, 173 L.Ed.2d 266

54 Ohio St.3d 716, 562 N.E.2d 163, approving and following *State v. Fox* (1938), 133 Ohio St. 154, 12 N.E.2d 413; *Browning v. State* (1929), 120 Ohio St. 62, 165 N.E. 566. Brenson has not cited any evidence in the record that the jury failed to follow the trial court's instruction.

{¶244} Accordingly, we find no error, harmless or otherwise, occurred.

{¶245} Brenson next argues that the trial court should have granted a mistrial after the prosecutor elicited inadmissible evidence during Lieutenant Gorney's testimony regarding items found in Brenson's vehicles in an October 1999 search, including a shotgun, shotgun shells, masks, knives, a D.E.A. hat, rubber gloves, and zip ties. (12T. at 1390; 1395).

{¶246} Before the State called this witness and outside the hearing of the jury, the trial court had ruled that:

{¶247} "We'll deny defendant's motion in limine allowing Lieutenant Gorney to testify regarding the search in 1999 of Mr. Brenson's vehicle. Obviously, I don't think you need to talk about a search warrant. He can talk about [how] he did a search of the vehicle and testify, show what he found in that vehicle. Number one, I don't think it is 404(B). It's certainly relevant, if it is 404(B), it may go to the exception for 404(B), and certainly, not a violation of 403." (12T. at 1386). Gorney then testified about items that he found in the vehicle of Brenson's codefendant that included wire ties, cable ties, hunting knives, and gloves. (Id. at 1393; 1395).

{¶248} After Lieutenant Gorney testified, defense counsel requested that Lieutenant Gorney's entire testimony be stricken from the record as being violative of

their clients' right to a fair trial. Counsel also requested a mistrial on these grounds. The Court granted the motion to strike the testimony of Lieutenant Gorney, ruling:

{¶249} "All right, the court will grant the motion to strike the entire testimony. The reason for that is that it was admissible for identification under 404(B), specifically limiting items to knives, gloves, and ties. Unfortunately, there was evidence brought in of a D.E.A. hat, a shotgun, ski mask and so forth, and because of that under 403, although the knives, gloves, and ties were relevant, the probative value is substantially outweighed by unfair prejudice at this point. And there's no way because of the pictures to sort out for the jury the knives, gloves, and ties from the other evidence that is unfairly prejudicial to Mr. Brenson." (12T. at 1535). The court denied the motion for mistrial.

{¶250} The granting of a mistrial rests within the sound discretion of the trial court as it is in the best position to determine whether the situation at hand warrants such action. *State v. Glover* (1988), 35 Ohio St.3d 18, 517 N.E.2d 900; *State v. Jones* (1996) 115 Ohio App.3d 204, 207, 684 N.E.2d 1304, 1306.

{¶251} "A mistrial should not be ordered in a criminal case merely because some error or irregularity has intervened * * *." *State v. Reynolds* (1988), 49 Ohio App.3d 27, 33, 550 N.E.2d 490, 497. The granting of a mistrial is necessary only when a fair trial is no longer possible. *State v. Franklin* (1991), 62 Ohio St.3d 118, 127, 580 N.E.2d 1, 9; *State v. Treesh* (2001), 90 Ohio St.3d 460, 480, 739 N.E.2d 749, 771. When reviewed by the appellate court, we should examine the climate and conduct of the entire trial, and reverse the trial court's decision as to whether to grant a mistrial only for a gross abuse of discretion. *State v. Draughn* (1992), 76 Ohio App.3d 664, 671, 602 N.E.2d 790, 793-794, citing *State v. Maurer* (1984), 15 Ohio St.3d 239, 473 N.E.2d 768,

certiorari denied (1985), 472 U.S. 1012, 105 S.Ct. 2714, 86 L.Ed.2d 728; *State v. Gardner* (1998), 127 Ohio App.3d 538, 540-541, 713 N.E.2d 473, 475; *State v Conley*, Richland App. No. 2009-CA-19, 2009-Ohio-2903 at ¶ 20.

{¶252} In *Illinois v. Somerville* (1973), 410 U.S. 458, 464, 93 S.Ct. 1066, 35 L.Ed.2d 425, the Supreme Court further refined the circumstances under which a trial court can order a mistrial:

{¶253} "A trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial. If an error would make reversal on appeal a certainty, it would not serve 'the ends of public justice' to require that the Government proceed with its proof when, if it succeeded before the jury, it would automatically be stripped of that success by an appellate court."

{¶254} After considering the evidence in light of the circumstances under which it was made, and the possible effect of the testimony on the jury, we find the trial court's short, authoritative instruction to the jury sufficed to remedy any possible error regarding the stricken evidence.

{¶255} At the time the court decided to strike the whole of Lieutenant Gorney's testimony, the court instructed the jury as follows:

{¶256} "Folks, we heard testimony this morning from Lieutenant Gorney from the Toledo Police Department and at this point in time, I instruct you all to disregard his testimony in full, completely, strike it from your memory, treat it as though you never heard it."

{¶257} At the conclusion of the trial, the court further instructed the jury,

{¶258} "A couple of preliminary instructions before I get to the final instructions. Number One, to remind you that you are not to consider Lieutenant Gorney's testimony and the pictures definite [sic.] to that testimony in making your decision…" (17T. at 2566).

{¶259} Further, the jury was instructed, "Let me emphasize any statements or answers that were stricken by the Court or which you were instructed to disregard are not evidence and they must be treated as though you never heard them. You must not speculate as to why the Court sustained the objection to any question or what the answer to that question might have been." (17T. at 2569).[12]

{¶260} Here, it was not unreasonable, arbitrary, or unconscionable for the trial court to admonish the jury on three separate occasions to ignore the stricken testimony rather than grant a mistrial. Curative instructions are presumed to be an effective way to remedy errors that occur during trial. *State v. Zuern* (1987), 32 Ohio St. 3d 56, 61. The trial judge in this case gave a short, authoritative instruction to the jury that sufficed to remedy any possible error regarding the struck testimony. A jury is presumed to follow instructions given it by the court. *State v. Henderson* (1988), 39 Ohio St.3d 24, 528 N.E.2d 1237. See also, *State v. Campbell* (1994), 69 Ohio St.3d 38, 51, 630 N.E.2d 339 (where the Court opined that it was implausible for that defendant to argue that the jury determined a capital case based on a minor legal misstatement made by the state during voir dire).

[12] Appellant did not object to these instructions nor does he challenge the clarity of these instructions on appeal.

{¶261} In the present case, the trial court properly exercised its discretion in denying the Brenson's motions for a mistrial.

{¶262} Brenson's seventh assignment of error is overruled.

VIII.

{¶263} Brenson in his eight assignment of error argues that the trial court erred in permitting Brenson's former defense counsel, Thomas Beal, to testify at trial.

{¶264} Specifically, Brenson argues that Beal's testimony was intended to demonstrate that co-defendant William Allen's trip to Florida was an attempt to flee prosecution in this case. Brenson submits, "However, Beal merely testified that the prosecution said it was going to dismiss the 2000 indictment and that his normal procedure was to promptly inform a client when an indictment was going to be dismissed. Beal was unable to recall whether he actually told Brenson. As a result, the jury had to infer from Beal's usual procedures that he actually did tell Brenson. The jury then had to infer that Brenson told Allen. There are two inferences stacked already, and we still have not arrived at a relevant flight-related finding. On top of the other two inferences, the jury also had to make a third inference that this was the reason why Allen returned from Florida. Thus, in the end, the only way Beal's testimony was relevant was if three inferences were stacked one upon another." [Appellant's Brief at 50-51].

{¶265} In *Rigby v. Lake County* (1991), 58 Ohio St.3d 269, 271, 569 N.E.2d 1056, 1058, the Supreme Court reaffirmed the longstanding test for appellate review of admission of evidence:

{¶266} "Ordinarily, a trial court is vested with broad discretion in determining the admissibility of evidence in any particular case, so long as such discretion is exercised in line with the rules of procedure and evidence. The admission of relevant evidence pursuant to Evid.R. 401 rest within the sound discretion of the trial court. E.g., *State v. Sage* (1987), 31 Ohio St.3d 173, 31 OBR 375, 510 N.E.2d 343, paragraph two of the syllabus. An appellate court, which reviews the trial court's admission or exclusion of evidence, must limit its review to whether the lower court abused its discretion. *State v. Finnerty* (1989), 45 Ohio St.3d 104, 107, 543 N.E.2d 1233, 1237. As this court has noted many times, the term 'abuse of discretion' connotes more than an error of law; it implies that the court acted unreasonably, arbitrarily or unconscionably. E.g., *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 5 OBR 481, 482, 450 N.E.2d 1140, 1142.

{¶267} A reviewing court should be slow to interfere unless the court has clearly abused its discretion and a party has been materially prejudiced thereby. *State v. Maurer* (1984), 15 Ohio St.3d 239, 264, 473 N.E.2d 768, 791. The trial court must determine whether the probative value of the evidence and/or testimony is substantially outweighed by the danger of unfair prejudice, or of confusing or misleading the jury. See *State v. Lyles* (1989), 42 Ohio St.3d 98, 537 N.E.2d 221.

{¶268} Brenson concedes that he did not raise this error in the trial court.

{¶269} As the United States Supreme Court recently observed in *Puckett v. United States*(2009), 129 S.Ct. 1423, 1428, 173 L.Ed.2d 266, "If an error is not properly preserved, appellate-court authority to remedy the error (by reversing the judgment, for example, or ordering a new trial) is strictly circumscribed. There is good reason for this; 'anyone familiar with the work of courts understands that errors are a constant in the

trial process, that most do not much matter, and that a reflexive inclination by appellate courts to reverse because of unpreserved error would be fatal.'" (Citation omitted).

{¶270} "[A]n appellate court may, in its discretion, correct an error not raised at trial only where the appellant demonstrates that (1) there is an error; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected the appellant's substantial rights, which in the ordinary case means it affected the outcome of the district court proceedings; and (4) the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *United States v. Marcus* (May 24, 2010), 560 U.S. __, 130 S.Ct. 2159, 2010 WL 2025203 at 4. (Internal quotation marks and citations omitted).

{¶271} "We have previously held that if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other constitutional[l] errors that may have occurred are subject to harmless-error analysis. *State v. Hill* (2001), 92 Ohio St.3d 191, 197, 749 N.E.2d 274, quoting *Rose v. Clark* (1986), 478 U.S. 570, 579, 106 S.Ct. 3101, 92 L.Ed.2d 460. Moreover, as we stated in *State v. Perry,* 101 Ohio St.3d 118, 2004- Ohio-297, 802 N.E.2d 643, [c]onsistent with the presumption that errors are not structural, the United States Supreme Court ha[s] found an error to be structural, and thus subject to automatic reversal, only in a very limited class of cases. *Johnson v. United States*, 520 U.S. 461, 468, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) (citing *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (complete denial of counsel)); *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (biased trial judge); *Vasquez v. Hillery*, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) (racial discrimination in selection of grand jury); *McKaskle v.Wiggins*, 465

U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) (denial of self representation at trial); *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31(1984) (denial of public trial); *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124L.Ed.2d 182 (1993) (defective reasonable-doubt instruction). *Wamsley*, supra 117 Ohio St.3d at 391-392, 884 N.E.2d at 48-49, 2008-Ohio-1195 at ¶ 16. [Citations and internal quotation marks omitted].

{¶272} A "structural error" analysis only supplies an automatic finding of prejudice for preserved errors thereby avoiding harmless error analysis. It does not supply an automatic finding of plain error for unpreserved errors. Id. (Citing *State v. Rector*, Carroll App. No. 01AP-758, 2003-Ohio-5438). The Ohio Supreme Court pertinently addressed when structural error analysis should be used in *State v. Perry,* supra:

{¶273} "We emphasize that both this court and the United States Supreme Court have cautioned against applying a structural-error analysis where, as here, the case would be otherwise governed by Crim.R. 52(B) because the defendant did not raise the error in the trial court. See *Hill*, 92 Ohio St.3d at 199, 749 N.E.2d 274; *Johnson*, 520 U.S. at 466, 117 S.Ct. 1544, 137 L.Ed.2d 718. This caution is born of sound policy. For to hold that an error is structural even when the defendant does not bring the error to the attention of the trial court would be to encourage defendants to remain silent at trial only later to raise the error on appeal where the conviction would be automatically reversed. We believe that our holdings should foster rather than thwart judicial economy by providing incentives (and not disincentives) for the defendant to raise all errors in the

trial court-where, in many cases, such errors can be easily corrected." 101 Ohio St.3d at 124, 802 N.E.2d at 649, 2004-Ohio-297 at ¶23.

{¶274} Thus, the defendant bears the burden of demonstrating that a plain error affected his substantial rights and, in addition that the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings. *United States v. Olano* (1993), 507 U.S. at 725,734, 113 S.Ct. 1770; *State v. Perry* (2004), 101 Ohio St.3d 118, 120 802 N.E.2d 643, 646. Even if the defendant satisfies this burden, an appellate court has discretion to disregard the error. *State v. Barnes* (2002), 94 Ohio St.3d 21, 27, 759 N.E.2d 1240; *State v. Long (*1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph three of the syllabus*; Perry,* supra, at 118, 802 N.E.2d at 646.

{¶275} The Supreme Court has repeatedly admonished that this exception to the general rule is to be invoked reluctantly. "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." Id. at paragraph three of the syllabus. See, also, *State v. Thompson* (1987), 33 Ohio St.3d 1, 10, 528 N.E.2d 542; *State v. Williford* (1990), 49 Ohio St.3d 247, 253, 551 N.E.2d 1279 (Resnick, J., dissenting).

{¶276} We note that the attorney Beal testified as follows, "

{¶277} "[Prosecuting Attorney]: Okay. Do you recall—Can you tell the jury whether you conveyed that information to Mr. Brenson?

{¶278} "* * *

{¶279} [Attorney Beal]: "Specifically, no, But I'm absolutely sure I did. I mean, I communicate with my clients.

{¶280} "* * *

{¶281} "[Prosecuting Attorney]: I believe your testimony was you're absolutely sure you did in this case?

{¶282} "[Attorney Beal]: I'm sure I did, because, as you say, it's important information." (10T. at 1181-1182.

{¶283} Thus, no inference was required; attorney Beal specifically testified that he informed Brenson about the dismissal in the original case. Additionally, the inference that Brenson and Allen were coconspirators was inferred from evidence independent of Beal's testimony. The crime in this case occurred on June 11, 2000. James Brenson was originally indicted for the murder of Herrell in Delaware County Common Pleas Case Number 00-CR-I-07-0195 on July 28, 2000. A car dealer in Toledo testified at trial that in April 2000, Allen purchased a car for $600 and then sold it back in July 2000 for $200. Allen's brother, Richard Allen testified that Allen suddenly moved to Florida in July 2000. (13T. at 1760). Silvy Allen's daughter, Shanica Masadeh, testified at trial that Silvy and William Allen suddenly moved to Florida in July 2000, and that Silvy gave custody of her and her brother to Silvy's grandmother because Silvy could not support her. (13T. at 1784). The police obtained records from Florida that Allen and Silvy both worked for a temporary agency from August 8, 2000, to December 20, 2000. Brenson's former attorney testified that he informed his client that the original indictment would be dismissed, and that the dismissal would occur in early December 2000. Allen returned to Ohio in late December 2000. During an interview with the police in 2005 when he was the victim of a felonious assault, Allen informed the police that he was good friends with Brenson. Additionally, evidence was admitted showing Allen's DNA in the general vicinity of Brenson's fingerprints and a blood soaked glove in the home of the victim.

{¶284} Under these circumstances, there is nothing in the record to show that the trial court abused its discretion or otherwise committed plain error in permitting Attorney Beal's testimony.

IX.

{¶285} In his ninth assignment of error, Brenson alleges that the trial court erred by submitting copies of Brenson's grand jury transcripts to the jury. Trial counsel objected to the submission of the transcripts to the jury. The trial court overruled the objection and ordered that the transcripts would be marked as an exhibit and sent back to the jury. The trial court permitted the copies to be sent to the jury. (16T. at 2338-2339).

{¶286} It is well settled that a trial court has broad discretion in determining whether to permit a jury to rehear all or part of a witness' testimony during deliberations. *State v. Leonard,* 104 Ohio St.3d 54, 2004- Ohio-6235, ¶ 123; *State v. Berry* (1971), 25 Ohio St.2d 255, paragraph four of the syllabus; *State v. Cox,* Butler App. No. CA2005-12-513, 2006-Ohio-6075, ¶ 11. Therefore, a reviewing court will not reverse a trial court's decision absent an abuse of discretion. Id.

{¶287} Brenson relies upon *United States v. Rodgers* (C.A. 6, 1997), 109 F.3d 1138, 1143 in support of his argument. In *Rodgers*, supra the Sixth Circuit Court of Appeals reviewed a district court's decision to provide a deliberating jury with the transcript of a law enforcement officer's trial testimony. In *Rodgers,* the Sixth Circuit discussed what it recognized as "two inherent dangers" in allowing a jury to read a transcript of a witness's testimony during deliberations: "[f]irst, the jury may accord

'undue emphasis' to the testimony"; and "second, the jury may apprehend the testimony 'out of context." Id. at 1143.

{¶288} The *Rodgers* Court explained that there is a heightened concern that the jury will place inordinate emphasis on testimony it reviews after it has reported its inability to arrive at a verdict. *Rodgers* at 1144**;** *Cox* at ¶ 15. In finding that no such situation occurred in the circumstances of the case before it and noting that there was not an inordinate amount of deliberation before or after the delivery of the transcript, the court held the case did not present an "obvious intent to emphasize a specific portion of the transcript." Id.

{¶289} In addition, in *Rodgers***,** the court emphasized that the district court eliminated the inherent danger of taking testimony out of context when it provided the jury with the entire testimony of the witness. Id.*; State v. Bleigh,* Delaware App. No. 09-31, 2010-Ohio-1182 at ¶ *92; Cox,* supra at ¶ 17*.*

{¶290} In the case at bar, we find the trial court did not abuse its discretion when it permitted the jury to receive the grand jury transcripts. First, the record does not support Brenson's contention that the jury placed undue emphasis on the testimony it reviewed. This case did not involve a situation where the jury reported an inability to reach a verdict or show an obvious intent to emphasize a specific portion of the trial proceedings. *Rodgers* at 1144. Further, there is nothing in the record or on appeal to suggest that the transcript provided to the jury was in any way inaccurate.

{¶291} We further reject Brenson's contention that the trial court erred by failing to give the jury a limiting instruction. *Bleigh* at ¶ 95. Brenson in the case at bar did not request a limiting instruction.

{¶292} We find any error in failing to issue a limiting instruction in this case would not rise to the level of plain error. In *Rodgers,* the court explained that the record failed to demonstrate that the district court's failure to give the cautionary instruction prejudicially affected the outcome of the trial or resulted in a miscarriage of justice. The court therefore held that the error did not rise to the level of plain error and overruled the appellant's argument.

{¶293} Similar to the appellant in *Rodgers,* Brenson in the case before us has failed to demonstrate that the court's failure to provide the jury with a limiting instruction affected the outcome of the case. As we have already discussed above, we do not find Brenson's contention that the jury afforded the transcript "undue emphasis" supported by the record. The jury, at no time, indicated a difficulty in reaching a unanimous verdict. Therefore, we do not find the court's failure to instruct the jury regarding the proper use or weight of the transcript to have affected the outcome of the case or created a manifest miscarriage of justice.

{¶294} Brenson's ninth assignment of error is overruled.

X.

{¶295} In his tenth assignment of error, Brenson claims that the trial court erred by permitting extensive evidence regarding Brenson's prior bad acts to be introduced at trial.

{¶296} Initially, we note that the decision to admit or exclude relevant evidence is within the sound discretion of the trial court. *State v. Bey* (1999), 85 Ohio St.3d 487, 490, 709 N.E.2d 484, 490. The trial court's decision to admit or exclude relevant evidence cannot be reversed absent an abuse of that discretion. See, e.g., *State v.*

Combs (1991), 62 Ohio St.3d 278, 581 N.E.2d 1071; *State v. Sage* (1987), 31 Ohio St.3d 173, 510 N.E.2d 343; *State v. Rooker* (Apr. 15, 1993), Pike App. No. 483, unreported. The term "abuse of discretion" implies more than an error of law or judgment. Rather, the term suggests that the trial court acted in an unreasonable, arbitrary, or unconscionable manner. See, e.g., *State v. Xie* (1992), 62 Ohio St.3d 521, 584 N.E.2d 715; *State v. Montgomery* (1991), 61 Ohio St.3d 410, 575 N.E.2d 167. Furthermore, when applying the abuse of discretion standard, a reviewing court is not free to merely substitute its judgment for that of the trial court. *In re Jane Doe 1* (1991), 57 Ohio St.3d 135, 566 N.E.2d 1181 (citing *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 359 N.E .2d 1301).

{¶297} Evid.R. 404 sets forth a general bar against the use of character evidence. Of importance to the case *sub judice,* Evid.R. 404(B) provides as follows:

{¶298} "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence or mistake or accident."

{¶299} The admissibility of other acts evidence is carefully limited because of the substantial danger that the jury will convict the defendant solely because it assumes that the defendant has a propensity to commit criminal acts, or deserves punishment regardless of whether he or she committed the crime charged in the indictment. See *State v. Curry* (1975), 43 Ohio St.2d 66, 68, 72 O.O.2d 37, 38, 330 N.E.2d 720, 723.

{¶300} Brenson argues that '[s]ome of this evidence was elicited without objection or without renewing the objections that had been raised in the motion in

limine; as a result, those pieces of evidence must be reviewed for plain error. *Diar,* 120 Ohio St.3d at 70". [Appellant's Brief at 58]. Brenson does not specifically identify which objections were made and which objects were waived.

{¶301} App.R. 16(A)(7) states that an appellant shall include in his brief "[a]n argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contention, with citations to the authorities, statutes and parts of the record on which appellant relies." "It is the duty of the appellant, not this court, to demonstrate [his] assigned error through an argument that is supported by citations to legal authority and facts in the record." *State v. Taylor* (Feb. 9, 1999), 9th Dist. No. 2783-M, at *3. See, also, App.R. 16(A) (7). "It is not the function of this court to construct a foundation for [an appellant's] claims; failure to comply with the rules governing practice in the appellate courts is a tactic which is ordinarily fatal." *Kremer v. Cox* (1996), 114 Ohio App.3d 41, 60.

{¶302} The federal courts have discussed the problems resulting when a party omits important information in its appellate brief noting;"[c]ourts are entitled to assistance from counsel, and an invitation to search without guidance is no more useful than a litigant's request to a district court at the summary judgment stage to paw through the assembled discovery material. 'Judges are not like pigs, hunting for truffles buried in the record.'" *Albrechtson v. Bd. Of Regents* (C.A.7, 2002), 309 F.2d 433, quoting *United State v. Dunkel* (C.A. 7, 1991), 927, 955, 956. Our own Supreme Court has noted:

{¶303} "The omission of page references to the relevant portions of the record that support the brief's factual assertions is most troubling. Appellate attorneys should

not expect the court 'to peruse the record without the help of pinpoint citations' to the record. *Day v. N. Indiana Pub. Serv. Corp.* (C.A.7, 1999), 164 F.3d 382, 384 (imposing a public reprimand and a $500 fine on an attorney for repeated noncompliance with court rules). In the absence of the page references that S.Ct.Prac.R. VI(2)(B)(3) requires, the court is forced to spend much more time hunting through the record to confirm even the most minor factual details to decide the case and prepare an opinion. That burden ought to fall on the parties rather than the court, for the parties are presumably familiar with the record and should be able to readily identify in their briefs where each relevant fact can be verified." *State ex rel. Physicians Commt. for Responsible Medicine v. Ohio State Univ. Bd. of Trustees,* 108 Ohio St.3d 288, 2006-Ohio-903, at ¶ 13; *See also,* State *v. Davis*, Licking App. No. 2007-CA-00104, 2008-Ohio-2418 at ¶ 91.

{¶304} As the United States Supreme Court recently observed in *Puckett v. United States*(2009), 129 S.Ct. 1423, 1428, 173 L.Ed.2d 266, "If an error is not properly preserved, appellate-court authority to remedy the error (by reversing the judgment, for example, or ordering a new trial) is strictly circumscribed. There is good reason for this; 'anyone familiar with the work of courts understands that errors are a constant in the trial process, that most do not much matter, and that a reflexive inclination by appellate courts to reverse because of unpreserved error would be fatal.'" (Citation omitted).

{¶305} "[A]n appellate court may, in its discretion, correct an error not raised at trial only where the appellant demonstrates that (1) there is an error; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected the appellant's substantial rights, which in the ordinary case means it affected the outcome

of the district court proceedings; and (4) the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *United States v. Marcus* (May 24, 2010), 560 U.S. __, 130 S.Ct. 2159, 2010 WL 2025203 at 4. (Internal quotation marks and citations omitted).

{¶306} "We have previously held that if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other constitutional[l] errors that may have occurred are subject to harmless-error analysis. *State v. Hill* (2001), 92 Ohio St.3d 191, 197, 749 N.E.2d 274, quoting *Rose v. Clark* (1986), 478 U.S. 570, 579, 106 S.Ct. 3101, 92 L.Ed.2d 460. Moreover, as we stated in *State v. Perry,* 101 Ohio St.3d 118, 2004- Ohio-297, 802 N.E.2d 643, [c]onsistent with the presumption that errors are not structural, the United States Supreme Court ha[s] found an error to be structural, and thus subject to automatic reversal, only in a very limited class of cases. *Johnson v. United States*, 520 U.S. 461, 468, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) (citing *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (complete denial of counsel)); *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (biased trial judge); *Vasquez v. Hillery*, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) (racial discrimination in selection of grand jury); *McKaskle v.Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) (denial of self representation at trial); *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31(1984) (denial of public trial); *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124L.Ed.2d 182 (1993) (defective reasonable-doubt instruction). *Wamsley*, supra 117 Ohio St.3d at 391-392, 884 N.E.2d at 48-49, 2008-Ohio-1195 at ¶ 16. [Citations and internal quotation marks omitted].

{¶307} A "structural error" analysis only supplies an automatic finding of prejudice for preserved errors thereby avoiding harmless error analysis. It does not supply an automatic finding of plain error for unpreserved errors. Id. (Citing *State v. Rector*, Carroll App. No. 01AP-758, 2003-Ohio-5438). The Ohio Supreme Court pertinently addressed when structural error analysis should be used in *State v. Perry,* supra:

{¶308} "We emphasize that both this court and the United States Supreme Court have cautioned against applying a structural-error analysis where, as here, the case would be otherwise governed by Crim.R. 52(B) because the defendant did not raise the error in the trial court. See *Hill*, 92 Ohio St.3d at 199, 749 N.E.2d 274; *Johnson*, 520 U.S. at 466, 117 S.Ct. 1544, 137 L.Ed.2d 718. This caution is born of sound policy. For to hold that an error is structural even when the defendant does not bring the error to the attention of the trial court would be to encourage defendants to remain silent at trial only later to raise the error on appeal where the conviction would be automatically reversed. We believe that our holdings should foster rather than thwart judicial economy by providing incentives (and not disincentives) for the defendant to raise all errors in the trial court-where, in many cases, such errors can be easily corrected." 101 Ohio St.3d at 124, 802 N.E.2d at 649, 2004-Ohio-297 at ¶23.

{¶309} Thus, the defendant bears the burden of demonstrating that a plain error affected his substantial rights and, in addition that the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings. *United States v. Olano* (1993), 507 U.S. at 725,734, 113 S.Ct. 1770; *State v. Perry* (2004), 101 Ohio St.3d 118, 120 802 N.E.2d 643, 646. Even if the defendant satisfies this burden, an appellate

court has discretion to disregard the error. *State v. Barnes* (2002), 94 Ohio St.3d 21, 27, 759 N.E.2d 1240; *State v. Long (*1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph three of the syllabus*; Perry,* supra, at 118, 802 N.E.2d at 646.

{¶310} The Supreme Court has repeatedly admonished that this exception to the general rule is to be invoked reluctantly. "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." Id. at paragraph three of the syllabus. See, also, *State v. Thompson* (1987), 33 Ohio St.3d 1, 10, 528 N.E.2d 542; *State v. Williford* (1990), 49 Ohio St.3d 247, 253, 551 N.E.2d 1279 (Resnick, J., dissenting).

{¶311} Brenson first argues that it was error for the trial court to admit evidence of his prior incarceration with the victim at Marion Correctional Institution in the 1980's. Evidence that Brenson and Herrell met while in prison was not objected to at trial. (14T. at 1983-1984). Accordingly, Brenson has waived all but plain error. See, *State v. Grubb* (1986), 28 Ohio St.3d 199,203,503 N.E.2d 142; *Puckett v. United States* (2009), 129 S.Ct. 1423, 1428, 173 L.Ed.2d 266.

{¶312} Brenson's motion in limine to exclude evidence of prior misconduct or incarceration was granted, except that the prosecution was allowed to admit evidence Brenson and the victim met in Marion Correctional Institute. This piece of information was deemed relevant to establish the longstanding connection that Brenson had with the victim, and it was not unfairly prejudicial to Brenson. The evidence was not admitted to show the Brenson's propensity to commit crimes or his "bad" charter; rather the evidence was admitted to establish that Brenson and the Herrell had a history. Accordingly, Brenson has failed to demonstrate that the admission of this evidence

affected his substantial rights and, in addition that the error seriously affected the fairness, integrity or public reputation of judicial proceedings.

{¶313} Brenson additionally argues that it was error for the trial court to allow the prosecution to introduce evidence of Brenson's various aliases.

{¶314} Evid.R. 404 sets forth a general bar against the use of character evidence. Of importance to the case *sub judice,* Evid.R. 404(B) provides as follows:

{¶315} "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence or mistake or accident."

{¶316} R.C. 2945.59 provides: "[i]n any criminal case which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with prior or subsequent thereto, notwithstanding with such proof may show or tend to show the commission of another crime by the defendant." Section 2945.59 is to be strictly construed against the State, and to be conservatively applied by a trial court. *State v. DeMarco* (1987), 31 Ohio St.3d 191, 194, 509 N.E.2d 1256.

{¶317} The admissibility of other acts evidence is carefully limited because of the substantial danger that the jury will convict the defendant solely because it assumes that the defendant has a propensity to commit criminal acts, or deserves punishment

regardless of whether he or she committed the crime charged in the indictment. See *State v. Curry* (1975), 43 Ohio St.2d 66, 68, 72 O.O.2d 37, 38, 330 N.E.2d 720, 723. This danger is particularly high when the other acts are very similar to the charged offense, or of an inflammatory nature, as is certainly true in this case. *State v. Schaim*, 65 Ohio St.3d 51, 60, 1992-Ohio-31, 600 N.E.2d 661,669.

{¶318} "Rule 404(b) only bars evidence of 'prior bad acts,' such as a criminal conviction, that are offered to show criminal disposition or propensity. If the evidence has an independent purpose, its admission is not prohibited by Rule 404(b)." See *United State v. Ushery* (6th Cir 1992), 968 F.2d 575, 580.

{¶319} We begin by noting that the indictment in the case at bar is captioned, in relevant part as "William T. Allen and James A. Brenson, Jr. (AKA James Brenson, Sr., James X. Brenson II, Jonquail Kirkland. James Abdullah Muhammad, Mustafa A. Muhammad, John Noble, James O. Wilson, K.W. Yowpp, K. Wallace Yowpp." (Indictment, filed March 16, 2008).

{¶320} Evidence that Brenson used the alias "Muhammad" or "Mustafa Muhammad"[13] is relevant because that is the name by which Allen knew Brenson. (14T. at 2033). Herrell's children also identified a photograph of Brenson as "Muhammad" an individual who knew their father. The use of the alias "K.W. Kowpp" would also be relevant as it related to the identity of the person signed a Meijer receipt from a Toledo-area store in the name of K.W. Yowpp, and this receipt from June 9, 2000 was dropped in the victim's home on the night of the murder; and lastly when

[13] Brenson's wife at the time, Robin Muhammad, testified that the couple was Muslim. (16T. at 2355).Further, Brenson identified himself to the grand jury on April 15, 2008 as "James Muhammad." (13T. at 1822). Additionally, Ibrahim Abdul Rahim, Iman for the Toledo Master of Ali Inman testified that Brenson became a Muslim back in the 1980's. (11T. at 1365). Accordingly, "Muhammad" may be Brenson's Muslim name and, therefore not an "alias" in the negative sense of the term.

Brenson checked into a hospital the morning after the murder, he also used the name Mustafa Muhammad.

{¶321} Accordingly, this evidence is permissible under Rule 404(b). It was not utilized to establish criminal disposition or propensity; rather the evidence demonstrates the connection between Allen and Brenson, and between Brenson and Herrell. [14] They certainly are relevant to prove identification: that the same person who drove a truck from Toledo to Delaware and who dropped a Meijer receipt dated June 9, 2000 in the victim's house on the night of the murder and who sought medical treatment the day after the brutal killing-was Brenson despite three different names used.

{¶322} Further, evidence that Brenson assumed the alias Mustafa Muhammad immediately after the crimes occurred was admissible to show consciousness of guilt, "It is today universally conceded that the fact of an accused's flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and related conduct, are admissible as evidence of consciousness of guilt, and thus of guilt itself. *State v. Eaton* (1969), 19 Ohio St.2d 145, 160, 48 O.O.2d 188, 196, 249 N.E.2d 897, 906, vacated on other grounds (1972), 408 U.S. 935, 92 S.Ct. 2857, 33 L.Ed.2d 750, quoting 2 Wigmore, Evidence (3 Ed.) 111, Section 276." *State v. Williams* (1997), 79 Ohio St.3d 1, 11, 679 N.E.2d 646, 657. The evidence further served to corroborate Allen's identification of Brenson.

{¶323} Finally, we note the jury was aware Brenson used the names "Muhammad" "Mustafa Muhammad" and "K.W. Kowpp." The revelation that he also used the name "Jonquail Kirkland" "M.A. Muhammad" and "Robin Shabazz" would be merely cumulative. Additionally, Brenson admitted to using these names in his

[14] Brenson did not object to the jury charge on complicity.

conversations with the police. (13T. at 1822; 1834; 1857; 1858). We find that there was "no reasonable possibility" that the testimony concerning Brenson's use of these other names contributed to Brenson's conviction, and any error was harmless beyond a reasonable doubt. See *State v. Rahman* (1986), 23 Ohio St.3d 146, 151, 492 N.E.2d 401, 407.

{¶324} Extra-Marital affairs and children

{¶325} Evidence of Brenson's numerous children and his extra-marital affairs was not used to depict him as a "serial womanizer and adulterer"; rather the evidence was used to impeach Brenson's alibi witness. Much of this evidence was revealed during the cross-examination of Brenson's ex-wife Robin Muhammad.

{¶326} In the case at bar, Brenson called his ex-wife Robin Muhammad as an alibi witness. (16T. at 2341). Ms. Muhammad testified that she had been married to Brenson from 1992 through 2002. (Id. at 2344). Ms. Muhammad testified that Allen had worked with Brenson in Toledo and would see him every few months. (16T. at 2346).

{¶327} Ms. Muhammad testified that she recalled giving Brenson $800.00 around the time of the murder. (16T. at 2359-2360). She testified that this was money that Brenson used to buy fireworks from Herrell. She further testified that she specifically remembers Brenson bring the fireworks home around the time of the murder. (Id. at 2353). The children were in bed and Brenson put the boxes of fireworks on the kitchen table. (Id.). Ms. Muhammad was able to recall that it was raining when Brenson arrived home in Toledo. (Id. at 2354). Ms. Muhammad also testified that Brenson did not have any blood on him, his clothing, or the boxes of fireworks. (16T. at 2356). Ms. Muhammad testified on direct examination that the day after the murder, Brenson

checked into the hospital. (Id. at 2357-2358).Further Ms. Muhammad claimed that Brenson had purchased fireworks from Herrell for three to four years. (Id. at 2359).

{¶328} On cross-examination, Ms. Muhammad admitted that Brenson checked into the hospital as “Mustafa Muhammad.” (Id. at 2361). Further, Brenson listed Ms. Muhammad on the hospital admission form as his unemployed sister despite the fact that she had a job as a home health aide. (Id. at 2362). The parties stipulated to the medical records. (16T. at 2339; 2398).

{¶329} The prosecutor then proceeds to delve into Ms. Muhammad’s knowledge of Brenson’s past and his whereabouts when he was absent from the home.

{¶330} The prosecutor proceeded to ask Ms. Muhammad about Brenson's whereabouts during the years of 1995 to 1999 and whether she was aware that he was living with a girlfriend, LaLitre, in Florida during that time. (16T. at 2390). Then the prosecutor turned to asking Ms. Muhammad if she knew Holly Lewis. Ms. Muhammad responded, "I think she used to work for a radio station doing advertising." The prosecutor then responded, "Did your husband ever tell you that he and Holly had a long term relationship and he drove down to Columbus about five times a year over a five year period to see her?" (Id. at 2392).

{¶331} The prosecutor further inquired, "Do you know if they [Brenson's children with Lalitre] were born in the course of your marriage?" Ms. Muhammad responded, "yes." The prosecution asked, "What about Minimah?" and Ms. Muhammad responded, "yes." The prosecutor then asked Ms. Muhammad, regarding Brenson's children with other women, "I'm up to ten. Do you know how many children he had in total?"

{¶332} The prosecutor proceeded to ask Ms. Muhammad about Brenson other children and the mothers of those children. If she knew how much time he spent with these other family members. The prosecution used property records to show that the address he gave the hospital was for a piece of property that Brenson had transferred between his sons' names, Robin's name, and the name Jonquail Kirkland. The prosecution also used BMV records to show that Brenson had used his sons' names and Robin's name to get identification, and had obtained identification using the names Yowpp and Kirkland. (16T. at 2374-75, 2377, 2382-83).

{¶333} As previously noted, Brenson admitted to using these names in his conversations with the police. (13T. at 1822; 1834; 1857; 1858]. Further, Brenson told the police that he had traveled to Columbus the day before Herrell was murdered to visit Holly Lewis. (13T. at 1836). He described his relationship with Ms. Lewis as “romantic” (Id. at 1836-1837). Brenson further stated that he frequently met Ms. Lewis in a motel in Columbus four to five times a year from 1989 through 2000. (13T. at 1838-1839).

{¶334} The United States Supreme Court described bias as “the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party. Bias may be induced by a witness' like, dislike, or fear of a party, or by the witness' self-interest.” *United States v. Abel* (1984), 469 U.S. 45, 52, 105 S.Ct. 465. It is fundamental that the bias of a witness may be explored to test credibility. *State v. Gavin* (1977), 51 Ohio App.2d 49, 53, 365 N.E.2d 1263. Furthermore, the potential bias of a witness is always significant in the assessment of the witness' credibility, as “the Trier of fact must be sufficiently informed of the underlying relationships, circumstances, and influences operating on the witness

'so that, in the light of his experience, he can determine whether a mutation in testimony could reasonably be expected as a probable human reaction.' "State *v. Williams* (1988), 61 Ohio App.3d 594, 597, 573 N.E.2d 704, citing 3 Weinstein, Evidence (1988), Section 607[03].

{¶335} Reasonable cross-examination includes not only the opportunity to impeach a witness: "[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness". *Davis v. Alaska,* (1974), 415 U.S. 308, 316, but also the exposure of a witness' motivation in testifying: 'A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.' 3A J. Wigmore Evidence Section 940, p. 775 (Chadbourn rev. 1970). We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. [415 U.S. 317]". *Greene v. McElroy*, (1959), 360 U.S. 474, 496, 3 L.Ed. 2d 1377, 79 S.Ct. 1400. *See also*, *Davis*, 415 U.S. at 316-317. *Olden v. Kentucky*, (1988), 488 U.S. 227, 109 S. Ct. 480 [Hereinafter referred to as

"*Olden*"]; *Delaware v. Van Arsdall* (1986), 475 U.S. 673, 678-679. [Hereinafter referred to as "*Van Arsdall*"].

{¶336} Thus, demonstrating to the jury Robin's knowledge and acquiesce in Brenson's providing false information and using false identities was reasonable in assessing her credibility as an alibi witness. Further, her lack of knowledge on many key aspects of Brenson's life suggests that she was unaware of his activities when he was not present within the home. Additionally, her lack of knowledge of Brenson's whereabouts on the day preceding the murder is pivotal in assessing the credibility of her alibi testimony. Contrary to Brenson's contentions, the prosecution's questions were relevant concerning Ms. Muhammad's' credibility and possible bias in this case. Evid.R. 616(A) states that "[b]ias, prejudice, interest, or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by extrinsic evidence." Clearly, these questions were relevant to develop Ms. Muhammad's, prejudice, or interest in fabricating an alibi to protect him.

{¶337} The more fundamental problem with the Brenson's 404(b) position is that it reflects a skepticism about the ability of the Court to craft limiting instructions regarding specific evidence and the ability or inclination of the jury to follow them.

{¶338} Brenson insists that the jury in this case, found him guilty of the most serious crime of aggravated murder because he was portrayed as "a lying ex-convict, who cheated on his wife." [Brenson's Brief at 30]. This lack of faith in the jury's capacity to follow instructions is contrary to experience and contrary to "the almost invariable assumption of the law that jurors follow their instructions." *Richardson v. Marsh,* 481

U.S. 200, 211, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987) (citing *Francis v. Franklin,* 471 U.S. 307, 325 n. 9, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985).

{¶339} "Jurors are called upon to serve in accordance with the law and to decide what facts have been proved and whether they have been proved beyond a reasonable doubt. Citizens do not assume this mantle lightly. Doubts and skepticism may be warranted in measuring the way other parts of government work, but they are unwarranted with [Delaware County] juries. I do not believe that the alleged wrongdoing in this case and any defenses to the alleged wrongdoing are beyond the comprehension of the typical juror. The jury in this case... approach[ed] their service with great care and attention and will strive to treat each defendant fairly and individually. They [were] given detailed guidance and limiting instructions from the Court." *United States v. W.R. Grace* (Mont 2006), 439 F. Supp. 1125, 1135.

{¶340} Brenson has not shown that the jury abandoned their oaths, their integrity or the trial court's instructions and found Brenson guilty of the most serious crime of aggravated murder because he had affairs and fathered children. There was no evidence that the jury was not able to heed the trial court's instruction to consider separately the evidence against each defendant, and Brenson failed to establish that a specific trial right was compromised because of this evidence.

{¶341} We find no error, plain or otherwise, affecting Brenson's substantial rights.

{¶342} Brenson's tenth assignment of error is overruled.

XI.

{¶343} In his eleventh assignment of error, Brenson argues that he was denied the right to effective assistance of trial counsel.

{¶344} In order to warrant a finding that trial counsel was ineffective, the petitioner must meet *both* the deficient performance and prejudice prongs of *Strickland* and *Bradley*. *Knowles v. Mirzayance* (2009), --- U.S. ----, 129 S.Ct. 1411, 1419, 173 L.Ed.2d 251

{¶345} "Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland v. Washington, 466 U.S. 668 at 689,104 S.Ct. at 2064

{¶346} In light of "the variety of circumstances faced by defense counsel [and] the range of legitimate decisions regarding how best to represent a criminal defendant," the performance inquiry necessarily turns on "whether counsel's assistance was reasonable considering all the circumstances." *Strickland v. Washington*, 466 U.S. 668 at 689,104 S.Ct. at 2064. At all points, "[j]udicial scrutiny of counsel's performance must be highly deferential." Strickland v. Washington, 466 U.S. 668 at 689,104 S.Ct. at 2064.

{¶347} Brenson first argues that counsel was ineffective for failing to adequately cross-examine his prior defense attorney, Thomas Beal. Brenson argues that Attorney Beal's notes indicate that the prosecutor did not decide to dismiss the original indictment against him until January 2001 long after his co-defendant Allen had returned to Ohio.

{¶348} The strategic decision not to cross-examine witnesses is firmly committed to trial counsel's judgment. *State v. Brown* (1988), 38 Ohio St.3d 305, 319, 528 N.E.2d 523, 540. Matters on which a witness is cross-examined are within the realm of trial counsel's strategy and tactics. *State v. Otte* (1996), 74 Ohio St.3d 555, 565, 660 N.E.2d 71.

{¶349} Attorney Beal testified that he spoke with the prosecuting attorney on December 3, 2000). (10T. at 1180-1181). The prosecutor indicated at that time that he would probably dismiss the case against Brenson on December 15, 2000). (Id.). From this testimony, the jury could infer that Brenson called his co-defendant Allen in December 2000 to share the good news that the case was going to be dismissed. Accordingly, the cross-examination of attorney Beal does not rise to the level of prejudicial error necessary to find that Brenson was deprived of a fair trial. Having reviewed the record that Brenson cites in support of his claim that he was denied effective assistance of counsel, we find Brenson was not prejudiced by defense counsel's cross-examination of attorney Beal. The result of the trial was not unreliable nor were the proceedings fundamentally unfair because of the performance of defense counsel.

{¶350} Brenson next argues that counsel was ineffective for failing to object to evidence admitted of Brenson's "prior bad acts" and for failing to renew the motion to sever. Brenson additionally states that counsel was ineffective for failing to request an instruction regarding the use of grand jury transcripts by the jury.

{¶351} As to Brenson's claim of ineffective assistance concerning failure to object and failure to renew the motion to sever, appellant fails to establish that counsel was ineffective. Counsel did in fact renew the motion to sever during the trial. (13T. at 1810-1812. Accordingly, Brenson's claim of ineffective assistance of counsel must fail.

{¶352} Brenson next argues that counsel was ineffective for failing to request a jury instruction regarding the grand jury testimony, which was admitted into evidence at trial.

{¶353} In *Neder v. United States* (1999), 527 U.S. 1, 119 S.Ct. 1827, the United States Supreme Court held that because the failure to properly instruct the jury is not in most instances structural error, the harmless-error rule of *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 applies to a failure to properly instruct the jury, for it does not *necessarily* render a trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.

{¶354} In light of our discussion of appellant's ninth assignment of error, appellant's claim of ineffective assistance of counsel must fail under the second prong of the *Strickland* test. Even if trial counsel's performance fell below an objective standard of reasonable representation, which we do not decide, we find any error was harmless.

{¶355} Brenson next argues that counsel was ineffective for failing to object to evidence admitted of appellant's "prior bad acts"

{¶356} "'The failure to object to error, alone, is not enough to sustain a claim of ineffective assistance of counsel.' " *State v. Fears* (1999), 86 Ohio St.3d 329, 347, 715 N.E.2d 136, quoting *State v. Holloway* (1988), 38 Ohio St.3d 239, 244, 527 N.E.2d 831.

{¶357} Brenson has failed to demonstrate that there exists a reasonable probability that, had trial counsel objected, the result of his case would have been different. The result of the trial was not unreliable nor was the proceedings fundamentally unfair because of the performance of defense counsel. We have found this evidence was admissible.

{¶358} We acknowledge the standard for harmless error in the admission of inflammatory or otherwise erroneous evidence is different from the standard under an ineffective assistance of counsel analysis. However, for the same reasons advanced in our discussion of the appellant's tenth assignment of error, we cannot find the result of the trial was unreliable or the proceeding was fundamentally unfair because of the performance of trial counsel. *State v. Boucher* (Dec. 23, 1999), Licking App. No. 99 CA 00045.

{¶359} None of the conduct raised by Brenson rises to the level of prejudicial error necessary to find that he was deprived of a fair trial. Having reviewed the record that Brenson cites in support of his claim that he was denied effective assistance of counsel, we find Brenson was not prejudiced by defense counsel's representation of him. The results of the proceedings were not unreliable nor were the proceedings

fundamentally unfair because of the performance of defense counsel. *State v. Dover*, Stark App. No. 2007-CA-00140, 2008-Ohio-1071 at ¶ 115.

{¶360} Brenson's eleventh assignment of error is overruled.

XII.

{¶361} In his twelfth assignment of error, Brenson claims he was denied the right to a fair trial based on cumulative error. Specifically, Brenson alleges that the errors outlined in his first eleven and thirteenth and fourteenth assignments of error amount to cumulative error requiring reversal.

{¶362} In *State v. Brown,* 100 Ohio St.3d 51, 796 N.E.2d 506, 2003-Ohio-5059, the Ohio Supreme Court recognized the doctrine of cumulative error. However, as explained in *State v. Bethel,* 110 Ohio St.3d 416, 854 N.E.2d 150, 2006-Ohio-4853, ¶ 197, it is simply not enough to intone the phrase "cumulative error." *State v. Sapp,* 105 Ohio St.3d 104, 822 N.E.2d 1239, 2004-Ohio-7008, ¶ 103.

{¶363} Here, appellant cites the doctrine of cumulative error, lists or incorporates the other four assignments of error, and gives no analysis or explanation as to why or how the errors have had a prejudicial cumulative effect. Thus, this assignment of error has no substance under *Bethel* and *Sapp*.

{¶364} Where we have found that the trial court did not err, cumulative error is simply inapplicable. *State v.* Carter, Stark App. No. 2002CA00125, 2003-Ohio-1313 at ¶37. To the extent that we have found that any claimed error of the trial court was harmless, or that claimed error did not rise to the level of plain error, we conclude that the cumulative effect of such claimed errors is also harmless because taken together,

they did not materially affect the verdict. *State v. Leonard,* 104 Ohio St.3d 54, 89-90, 818 N.E.2d 229, 270, 2004-Ohio-6235 at ¶185.

{¶365} In addition, "just as harmless-error analysis is utilized only to determine whether actual *error* should be disregarded, a cumulative-error analysis aggregates only actual errors to determine their cumulative effect. Individual rulings frequently will have an adverse effect on a party, but unless that party can demonstrate that the ruling was an error, reversal would not be warranted. Impact alone, not traceable to error, cannot form the basis for reversal. The same principles apply to a cumulative-error analysis, and we therefore hold that a cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors. *See United States v. Smith,* 776 F.2d at 899; see also *United States v. Barshov,* 733 F.2d 842, 852 (11th Cir. 1984), *cert. denied,* 469 U.S. 1158, 105 S.Ct. 904, 83 L.Ed.2d 919 (1985)."

{¶366} As this case does not involve multiple instances of error, and because Brenson has failed to provide any analysis in his claim, his twelfth assignment of error is meritless.

{¶367} Accordingly, Brenson's twelfth assignment of error is overruled.

XIII.

{¶368} In his thirteenth assignment of error, Brenson argues that his conviction was against the manifest weight of the evidence. We disagree.

{¶369} While the test for sufficiency requires a determination of whether the state has met its burden of production at trial, a manifest-weight challenge questions whether the state has met its burden of persuasion. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390, 678 N.E.2d 541, 548-549 (Cook, J., concurring). In making this

determination, we do not view the evidence in the light most favorable to the prosecution. Instead, we 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 and a new trial ordered." *State v. Thompkins*, supra, 78 Ohio St.3d at 387. (Quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717, 720-721). Accordingly, reversal on manifest weight grounds is reserved for "the exceptional case in which the evidence weighs heavily against the conviction." *State v. Thompkins,* supra. In *State v. Thompkins*, supra the Ohio Supreme Court further held "[t]o reverse a judgment of a trial court on the basis that the judgment is not sustained by sufficient evidence, only a concurring majority of a panel of a court of appeals reviewing the judgment is necessary." 78 Ohio St.3d 380 at paragraph three of the syllabus.

{¶370} In order to convict appellant of aggravated murder under R.C. 2903.01(A), the state would have had to prove that appellant, with prior calculation and design, purposely caused the death of another.

{¶371} In order to convict appellant of aggravated murder under R.C. 2903.01(B), the state would have had to prove that appellant purposely caused the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, kidnapping or aggravated robbery.

{¶372} In order to convict appellant of murder under R.C. 2903.02, the state would have had to prove that appellant purposely caused the death of another.

{¶373} In order to convict appellant of aggravated robbery under R.C. 2911.01(A)(1), the state had to prove that appellant, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, had a deadly weapon on or about his person or under his control and either displayed, brandished, or used the weapon. A deadly weapon is defined in R.C. 2923.11 as "any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon."

{¶374} In order to convict appellant of aggravated robbery under R.C. 2911.01(A)(3), the state would have had to prove that appellant, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, inflicted or attempted to inflict serious physical harm on another.

{¶375} In order to convict appellant of kidnapping, the state would have had to prove that appellant by force, threat, or deception, removed another from the place where the other person is found or restrain the liberty of the other person, in order to facilitate the commission of a felony or to terrorize or inflict serious physical harm on the other person. R.C. 2905.01(A) (2) & (3).

{¶376} In the case at bar, Brenson admitted that he went to Herrell's house during the evening hours of June 11, 2000, to purchase illegal fireworks from Herrell. Brenson knew Herrell from time they spent together in Marion Correctional Institution in the early 1980's. Herrell's son, Michael, knew Brenson. (8T. at 544-545).Herrell's daughter, Dewan Herrell, also knew Brenson and remembered him visiting a few times.

(10T. at 1080). Brenson's ex-wife, Minimah Garrett had heard Brenson mention that he had a friend in Delaware. (11T. at 1323). Brenson's brother, Ernest Moore knew Herrell as "Duck," and once accompanied Brenson to Herrell's house for a social visit where they saw Herrell's hunting dogs. (11T. at 1341). A friend of Brenson who was Muslim minister, Ibrahim Abdul Rahim, also knew that Brenson was friends with Herrell and had accompanied Brenson on a visit to Herrell's house once when they were passing through on a trip in the early to mid-1980s. (11T. at 1366).

{¶377} Brenson's fingerprints were found at the scene on both a receipt from Meijer's dated June 9, 2000 and the envelope containing dog tags at Herrell's residence. His codefendant, Allen's DNA was found on a pair of bloody gloves that also had Herrell's DNA on them and on a blue shirt that was left at the scene. The DNA of Allen's wife was also found on that shirt. The proportion of the population that cannot be excluded as a possible contributor to the DNA on the blue shirt "is one in sixteen million seven hundred and seventy thousand unrelated individuals." (13T. at 1700). This means that if sixteen million seven hundred seventy thousand people were tested there would be only one person who could not be excluded as a contributor to the DNA sample. (Id.). Every other one of the over sixteen million, six hundred thousand individuals tested would be excluded as a source of the DNA sample found on the shirt. (Id. at 1701). In addition, the DNA from both the blue shirt and the glove was tested and found not to be consistent with three other individuals for whom the police had submitted DNA samples for testing. (Id. at 1575-1576; 1586-1587).

{¶378} The shirt containing DNA consistent with that of Allen and his wife was found inside a home where a murder occurred, two to three feet from the blood soaked

glove. (14T. at 1921; 1924; State's Exhibit 2-C). Obviously, the presence in the home of the blue shirt containing Allen and his wife's DNA may be consistent with innocent causes, but the presence of the blue shirt is also consistent with Allen's participation in the crimes.

{¶379} Brenson's first wife, Minimah Garrett, knew Allen was a friend of Brenson. (11T. at 1322). Brenson's sister, Goldie Crisp, knew that Allen and Brenson were acquainted, but they did not hang out together. (11T. at 1329-1331). Brenson's brother, Ernest Moore, knew Allen, and testified that Allen and Brenson were friends who were together periodically, but not a lot. (11T. at 1339 1341; 1344] Allen's brother, Richard, also testified that Brenson and Allen were good friends, although he admitted that he had never actually seen them together. (12T. at 1762-63).

{¶380} The prosecution presented evidence from a rain gauge maintained in Delaware for the public utilities that indicated that there was no rain on the night in question, contrary to Brenson's statements. (10T. at 1017-1018).

{¶381} Herrell was found tied up with zip ties in his basement and was stabbed 51 times. Herrell's house had been ransacked when his son arrived at his house the day after the murder. Michael Herrell and others who knew Herrell stated that Herrell was an immaculate housekeeper who never left his house a mess.

{¶382} Further, evidence that Brenson assumed the alias Mustafa Muhammad immediately after the crimes occurred was admissible to show consciousness of guilt, "It is today universally conceded that the fact of an accused's flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and related conduct, are admissible as evidence of consciousness of guilt, and thus of guilt itself. *State v. Eaton*

(1969), 19 Ohio St.2d 145, 160, 48 O.O.2d 188, 196, 249 N.E.2d 897, 906, vacated on other grounds (1972), 408 U.S. 935, 92 S.Ct. 2857, 33 L.Ed.2d 750, quoting 2 Wigmore, Evidence (3 Ed.) 111, Section 276." *State v. Williams* (1997), 79 Ohio St.3d 1, 11, 679 N.E.2d 646, 657.

{¶383} The police found a savings book indicating that Herrell withdrew $1000 from the bank that Friday, but they never found any cash. (14T. at 1931, 1941-42). They found a tub of pennies and silver coins in Herrell's closet, but a tub of gold dollars was missing. The police found zip ties on the floor in the living room. (14T. at 1937).

{¶384} "A fundamental premise of our criminal trial system is that 'the *jury* is the lie detector.' *United States v. Barnard,* 490 F.2d 907, 912 (C.A.9 1973) (emphasis added), cert. denied, 416 U.S. 959, 94 S.Ct. 1976, 40 L.Ed.2d 310 (1974). Determining the weight and credibility of witness testimony, therefore, has long been held to be the 'part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men.' *Aetna Life Ins. Co. v. Ward,* 140 U.S. 76, 88, 11 S.Ct. 720, 724-725, 35 L.Ed. 371 (1891)". *United States v. Scheffer* (1997), 523 U.S. 303, 313, 118 S.Ct. 1261, 1266-1267.

{¶385} Although appellant cross-examined the witnesses, presented his own witnesses and argued that there was an endless cast of other potential suspects. The weight to be given to the evidence and the credibility of the witnesses are issues for the Trier of fact. *State v. Jamison* (1990), 49 Ohio St.3d 182, certiorari denied (1990), 498 U.S. 881.

{¶386} The jury was free to accept or reject any and all of the evidence offered by the parties and assess the witness's credibility. "While the jury may take note of the

inconsistencies and resolve or discount them accordingly * * * such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence". *State v. Craig* (Mar. 23, 2000), Franklin App. No. 99AP-739, citing *State v. Nivens* (May 28, 1996), Franklin App. No. 95APA09-1236 Indeed, the jurors need not believe all of a witness' testimony, but may accept only portions of it as true. *State v. Raver,* Franklin App. No. 02AP-604, 2003- Ohio-958, at ¶ 21, citing *State v. Antill* (1964), 176 Ohio St. 61, 67, 197 N.E.2d 548.; *State v. Burke,* Franklin App. No. 02AP-1238, 2003-Ohio-2889, citing *State v. Caldwell* (1992), 79 Ohio App.3d 667, 607 N.E.2d 1096. Although the evidence may have been circumstantial, we note that circumstantial evidence has the same probative value as direct evidence. *State v. Jenks* (1991), 61 Ohio St. 3d 259, 574 N.E. 2d 492.

{¶387} The jury heard the witnesses, evaluated the evidence, and was convinced of appellant's guilt. We conclude the Trier of fact, in resolving the conflicts in the evidence, did not create a manifest injustice to require a new trial.

{¶388} After reviewing the evidence, we cannot say that this is one of the exceptional cases where the evidence weighs heavily against the convictions. The jury did not create a manifest injustice by concluding that appellant was guilty of the crimes charged in the indictment.

{¶389} Appellant’s thirteenth assignment of error is overruled.

XIV.

{¶390} In his fourteenth, and final, assignment of error, appellant argues that his convictions should have been merged into one count of aggravated murder and one count of kidnapping or aggravated robbery. Specifically, he argues since there was no

separate animus, the four counts of kidnapping and aggravated robbery merges into one[15]. *State v. Winn,* 121 Ohio St.3d 413, 905 N.E.2d 154, 2009-Ohio-1059, ¶¶ 21-25.

{¶391} The federal and state constitutions' double jeopardy protection guards citizens against cumulative punishments for the "same offense." *State v. Moss* (1982), 69 Ohio St.2d 515, 518; *State v. Basham*, Muskingum App. No. CT2007-0010, 2007-Ohio-6995 at ¶ 41. Despite such constitutional protection, a state legislature may impose cumulative punishments for crimes that constitute the "same offense" without violating double jeopardy protections. *State v. Rance* (1999), 85 Ohio St.3d 632, 635, citing *Albernaz v. United States* (1981), 450 U.S. 333, 344. Under the "cumulative punishment" prong, double jeopardy protections do "no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri v. Hunter* (1983), 459 U.S. 359, 366. When a legislature signals its intent to either prohibit or permit cumulative punishments for conduct that may qualify as two crimes, the legislature's expressed intent is dispositive. *Rance,* at 635. Therefore, when determining the constitutionality of imposing multiple punishments against a criminal defendant in one criminal proceeding for criminal activity emanating from one transaction, appellate courts are limited to assuring that the trial court did not exceed the sentencing authority the legislature granted to the judiciary. *Moss,* at 518, citing *Brown v. Ohio* (1977), 432 U.S. 161. The trial court's authority to impose multiple punishments is contained in Ohio's multi-count statute, R.C. 2941.25.

{¶392} "[I]f a defendant commits offenses of similar import separately or with a separate animus, he may be punished for both pursuant to R.C. 2941.25(B). *State v. Jones* (1997), 78 Ohio St.3d 12, 13-14, 676 N.E.2d 80, 81." *Rance,* 85 Ohio St.3d at

[15] Appellant raised this argument before sentencing in the trial court. (18T. at 2626-2627).

635-636, 710 N.E.2d 699; *State v. Cooper,* 104 Ohio St.3d 293, 296, 2004-Ohio-6553 at ¶ 13, 819 N.E.2d 657, 660.

{¶393} R.C. 2941.25 provides:

{¶394} "(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

{¶395} "(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

{¶396} Recently, the Supreme Court of Ohio in *State v. Cabrales,* 118 Ohio St.3d 54, 57, 2008-Ohio-1625, 884 N.E.2d 181, instructed as follows:

{¶397} "In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), courts are required to compare the elements of offenses in the abstract without considering the evidence in the case, but are not required to find an exact alignment of the elements. Instead, if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in the commission of the other, then the offenses are allied offenses of similar import."

{¶398} Nonetheless, even though the offenses are of similar import under R.C. 2941.25(A), Subsection (B) permits convictions for two or more similar offenses if the

offenses were either (1) committed separately, or (2) committed with a separate animus as to each. See *State v. Price* (1979), 60 Ohio St.2d 136, 398 N.E.2d 772, paragraph five of the syllabus.

{¶399} In *State v. Brown,* 119 Ohio St.3d 447, 895 N.E.2d 149, 2008-Ohio-4569 the court has indicated that the two-tiered *Rance* test is merely a tool, not a requirement, used to determine the legislature's intentions regarding whether to permit cumulative sentencing. *Id.* at ¶ 37, 710 N.E.2d 699; *State v. Mosley,* Cuyahoga App. No. 90706, 2008-Ohio-5483 at ¶ 32. " 'By asking whether two separate statutes each include an element the other does not, a court is really asking whether the legislature manifested an intention to serve two different interests in enacting the two statutes.' " *State v. Brown,* supra at ¶ 35, quoting *Whalen v. United States,* 455 U.S. 684, 713, 100 S.Ct. 1432, 63 L.Ed.2d 715 (Rehnquist, J. dissenting.) If the legislature's intent is clear from the language of the statute, one need not resort to the two-tiered test. *State v. Brown,* supra at ¶ 37.

{¶400} A defendant may be indicted and tried for allied offenses of similar import, but may be sentenced on only one of the allied offenses. *State v. Brown,* 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶ 42, citing *Geiger,* 45 Ohio St.2d at 244, 74 O.O.2d 380, 344 N.E.2d 133. Because R.C. 2941.25 (A) protects a defendant only from being punished for allied offenses, the determination of the defendant's guilt for committing allied offenses remains intact, both before and after the merger of allied offenses for sentencing. *State v. Whitfield* (Jan. 5, 2010), Ohio Sup.Ct. Case No. 2008-1669, 2010-Ohio-2 at ¶ 27. Thus, the trial court should not vacate or dismiss the guilt

determination on each count. Id*. State v. Bleigh,* Delaware App. No. 09-CAA-03-0031, 2010-Ohio-1182 at ¶ 153.

{¶401} Appellant is correct; aggravated murder counts involving the same victim are merged for sentencing. *State v. O'Neal*, 87 Ohio St.3d 402*,* State *v. Lawson* (1992), 64 Ohio St.3d 336, 351, 595 N.E.2d 902, 913; R.C. 2941.25(A). Here, the trial court should have merged the two aggravated murder counts and imposed only a single sentence. See Id.*; State v. Huertas,* 51 Ohio St.3d at 28, 553 N.E.2d at 1066.

{¶402} The Ohio Supreme Court again addressed this issue in *State v. Winn,* 121 Ohio St.3d 413, 905 N.E.2d 154, 2009-Ohio-1059. In *Winn,* the court considered whether kidnapping and aggravated robbery are allied offenses of similar import. The court compared the elements of each in the abstract. The elements for kidnapping, R.C. 2905.01(A)(2), are the restraint, by force, threat, or deception, of the liberty of another to facilitate the commission of any felony, and the elements for aggravated robbery, R.C. 2911.01(A)(1), are having a deadly weapon on or about the offender's person or under the offender's control and either displaying it, brandishing it, indicating that the offender has it, or using it in attempting to commit or in committing a theft offense. The court found that in comparing the elements, it is difficult to see how the presence of a weapon, which has been shown or used, or whose possession has been made known to the victim during the commission of a theft offense, does not at the same time forcibly restrain the liberty of another. Id. at ¶ 21. Accordingly, the court found that the two offenses are so similar that the commission of one necessarily results in the commission of the other, citing *Cabrales,* supra. Id. The court held, "We would be hard

pressed to find any offenses allied if we had to find that there is no conceivable situation in which one crime can be committed without the other." Id. at ¶ 24.

{¶403} Having found the offenses to be of similar import under the *Cabrales* test, the Ohio Supreme Court in *Winn* did not consider the societal interests underlying the statutes to determine legislative intent, and determined legislative intent solely by applying R.C. 2941.25. The *Winn* court stated that, in Ohio, we discern legislative intent on this issue by applying R.C. 2941.25, as the statute is a "clear indication of the General Assembly's intent to permit cumulative sentencing for the commission of certain offenses." Id. at ¶ 6.

{¶404} Appellant was convicted of Kidnapping pursuant to R.C. 2905.01. Specifically appellant was convicted under (A) (2) and (3):

{¶405} "(A) 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:

{¶406} "***

{¶407} "(2) To facilitate the commission of any felony or flight thereafter;

{¶408} "(3) To terrorize, or to inflict serious physical harm on the victim or another

{¶409} "* * *"

{¶410} As each subsection requires elements that the other does not the offenses are not so similar that the commission of one offense will necessarily result in the commission of the other. Accordingly, we find that the offenses of kidnapping under

R.C. 2905.01(A) (2) is not an allied offense of similar import to a charge of kidnapping under R.C.2905.01 (A) (3). Further appellant has failed to demonstrate that the two crimes, even if allied, were not committed with a separate animus.

{¶411} Accordingly, the trial court was correct to sentence appellant on each count of kidnapping.

{¶412} Appellant was further convicted of two counts of aggravated robbery. R.C. 2911.01 provides in relevant part,

{¶413} "(A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following:

{¶414} "(1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it;

{¶415} "* * *

{¶416} "(3) Inflict, or attempt to inflict, serious physical harm on another.

{¶417} As each subsection requires elements that the other does not the offenses are not so similar that the commission of one offense will necessarily result in the commission of the other. Accordingly, we find that the offenses of aggravated robbery under R.C. 2911.01(A) (1) is not an allied offense of similar import to a charge of aggravated robbery under R.C. 2911.01(A) (3). Further appellant has failed to demonstrate that the two crimes, even if allied, were not committed with a separate animus.

{¶418} Accordingly, the trial court was correct to sentence appellant on each count of aggravated robbery.

{¶419} According to the Ohio Supreme Court decision in *Winn*, supra the elements for kidnapping, R.C. 2905.01(A)(2), are the restraint, by force, threat, or deception, of the liberty of another to facilitate the commission of any felony, and the elements for aggravated robbery, R.C. 2911.01(A)(1), are having a deadly weapon on or about the offender's person or under the offender's control and either displaying it, brandishing it, indicating that the offender has it, or using it in attempting to commit or in committing a theft offense. The Court found as such that they are allied offenses of similar import.

{¶420} Accordingly, appellant's conviction for aggravated robbery, R.C. 2911.01(A) (1), and for kidnapping R.C. 2905.01(A) (2) should have been merged for sentencing purposes.

{¶421} We are bound to follow the dictates of the Ohio Supreme Court,

{¶422} "If, upon appeal, a court of appeals finds reversible error in the imposition of multiple punishments for allied offenses, the court must reverse the judgment of conviction and remand for a new sentencing hearing at which the state must elect which allied offense it will pursue against the defendant. On remand, trial courts must address any double jeopardy protections that benefit the defendant ..." *State v. Whitfield,* 124 Ohio St.3d 319, 922 N.E.2d 182, 2010-Ohio-2 at ¶ 25.

{¶423} Accordingly, the judgment of the Delaware County Court of Common Pleas is affirmed, in part and reversed, in part. In accordance with the Ohio Supreme Court's decision in *Whitfield,* we remand this case to the trial court for further proceedings consistent with that opinion. This decision in no way affects the guilty verdicts issued by the jury. It only affects the entry of conviction and sentence. Appellant's convictions are affirmed.

{¶424} For the foregoing reasons, the judgment of the Court of Common Pleas of Delaware County, Ohio, is affirmed in part, reversed in part and remanded.

By Gwin, P.J., and

Wise, J., concur;

Delaney, J., dissents

_____
HON. W. SCOTT GWIN

_____
HON. JOHN W. WISE

_____
HON. PATRICIA A. DELANEY

WSG:clw 0430

Delaney, J., dissenting

{¶425} I respectfully dissent from the majority opinion. I would sustain Appellant's third, tenth and twelfth assignments of error for the reasons set forth herein and in my dissenting opinion in *State v. Allen,* 5th Dist. No. 09-CA-13, ---- Ohio ----. The majority holds today that Appellant has not shown prejudice sufficient to amount to cumulative error requiring a reversal and a new trial. In so doing, the majority summarily dismisses the numerous errors that pervaded the jury proceedings, prohibiting Appellant from receiving a fair trial that justice requires.

{¶426} The cumulative error doctrine requires a conviction to be reversed "where the cumulative effect of errors in a trial deprives a defendant of the constitutional right to a fair trial even though each of numerous instances of trial court error does not individually constitute cause for reversal." *State v. Garner* (1995), 74 Ohio St.3d 49, 64, 656 N.E.2d 623, 637.

{¶427} In the present case, I find that there have been multiple instances of harmless error triggering the cumulative error doctrine. First, the majority summarily dismisses as nonprejudicial and cumulative that Appellant used multiple aliases other than K.W. Yowpp. Evidence was admitted that Appellant used the additional aliases of M.A. Muhammad, Muhammad Mustafa[16], Jonquail Kirkland, and Robin Shabazz. Admission of these aliases had nothing to do with Appellant's motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake regarding the

[16] The evidence that Appellant used his son's name to check into the hospital is in no way relevant to the guilt or innocence of Appellant or Allen, nor does it show consciousness of guilt as the majority now suggests. See majority opinion, ¶322. This was not argued as "consciousness of guilt" at trial or on appeal. More conceivably, the prosecution introduced this evidence to taint Appellant's credibility and imply that he was attempting to not pay his hospital bill by giving faulty information to the hospital.

charges in the instant case. Rather, they were used to show Brenson's bad character.[17] Evidence introduced of use of an alias where the alias is not an integral part of the commission of the crime is a violation of Evid. R. 404. See *State v. Petty* (May 21, 1987), 8th Dist. No. 52069.[18]

{¶428} The majority summarily dismisses the prejudice from the admission of evidence that Brenson used multiple social security numbers. Again, admission of such evidence is not relevant to either the prosecution of Appellant or Allen. The admission of these social security numbers had nothing to do with Appellant motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake with regard to the charges in the instant case.[19] The majority fails to adequately explain how these aliases, social security numbers, and references to Appellant's illegitimate children were relevant; rather the majority sidesteps the issue that such character evidence was not only inadmissible, but was also highly prejudicial against both defendants.

{¶429} The majority also rejects the prejudice created by the admission of evidence that Appellant was having an affair with one woman while married to another. Such evidence is highly inflammatory as it relates to Appellant and certainly has no bearing on Appellant's guilt. This is evidence admitted solely to tarnish the reputation of the accused. Moreover, evidence that Appellant had extramarital affairs and that he

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[17] References to Appellant's various aliases were discussed at the following pages in the transcript: 554, 1055, 1326, 1347, 1361, 1362, 1365, 1389, 1822, 1834, 1857-1858, 1971, 1972, 1977-1979, 1980, 1981, 1984, 2033, 2062, 2212, 2361, 2364, 2366, 2370, 2371, 2373, 2375, 2379, 2382, 2383, 2409, 2416, 2526, 2555; references were also found in the Grand Jury transcript sent back to the jury at pages 17 and 46-47.

[18] The majority also mentions that indictment listed out various aliases of Brenson. See majority opinion, ¶ 319. An indictment serves only to put a defendant on notice of the crimes with which he is charged. Crim. R. 7(B). It does not serve as a discovery mechanism, nor does it serve to put a defendant on notice that the State would seek to improperly introduce evidence of multiple aliases at trial.

[19] References to various social security numbers used by Brenson can be found at the following pages in the transcript: 1152, 1972, 1976-1977, 1977-1979, 2383, 2422, and 2526.

fathered multiple children with different women is both irrelevant and highly inflammatory.[20] Again, there is no good faith basis for the admission of such evidence against either codefendant. The prosecutor argued that such information was relevant as it went to "financial situation and motive."[21] The prosecution then proceeded to ask questions to Brenson's ex-wife, Robin Shabazz, such as "Do you know if they [Brenson's children with Lalitre] were born in the course of your marriage?" to which Shabazz responded, "yes." The prosecution asked, "What about Minimah?" and Shabazz responded, "yes." The prosecutor then asked Shabazz, regarding Brenson's children with other women, "I'm up to ten. Do you know how many children he had in total?" to which Shabazz replied, "eleven." The prosecutor, not satisfied with having Shabazz merely state the answer repeated, "He has eleven children?" (Tr. 2380-2381).

{¶430} The prosecutor proceeded to ask Shabazz about Brenson's whereabouts during the years of 1995 to 1999 and whether she was aware that he was living with a girlfriend, LaLitre, in Florida during that time. (Tr. 2390). Then the prosecutor immediately turned to asking Shabazz if she knew Holly Lewis. Shabazz responded "I think she used to work for a radio station doing advertising." The prosecutor then responded, "Did your husband ever tell you that he and Holly had a long term relationship and he drove down to Columbus about five times a year over a five year

[20] References during trial to Brenson's illegitimate children and his extramarital affairs can be found at the following pages in the transcript: 508, 1836-1837,1854, 1975, 1976-1977, 1977-1979, 1991, 1995, 2023, 2075, 2086, 2216, 2231, 2249, 2348, 2370, 2379, 2380, 2381, 2390, 2391, 2392; references were also found in the Grand Jury transcript sent back to the jury at page 17, lines 1-13, page 20, and pages 23-24.

[21] There was never argument by the prosecution, either at trial or before this Court, that such evidence was elicited during the cross-examination of Shabazz to impeach or show her bias as the majority now suggests. See majority opinion, ¶¶ 334-336. In fact the State concedes in its brief that it sought to introduce "motive for the State's theory of the murder * * * [e]vidence that Appellant had many children and the financial stresses that accompany many children, was extremely relevent to provide a motive for the crime." Appellee's Brief, p. 30.

period to see her?" (Tr. 2392). I cannot comprehend, nor can the majority defend, the relevance of this testimony as it relates to the witness's bias in favor of Brenson.

{¶431} Though the prosecutor claimed that this information was essential to establish Brenson's motive (Tr. 2379), during their closing arguments, they did not one time mention that such a motive existed. The majority has reconstructed the State's argument to one of bias, which still fails to adequately defend the admission of such testimony. In fact, the prosecution made clear to ask the court to instruct the jury that "they may find the defendants guilty without knowing their motive, if they find every element proven beyond a reasonable doubt and the state went between that purpose, which I think was somewhat confusing during Mr. McVay's closing." (Tr. 2557). The prosecution also stated, during rebuttal closing, that "I want to be clear about this issue of motive also because Mr. McVay, I think, muddied the waters on that. Motive, ladies and gentlemen, in this case and I think it's fairly clear, is robbery. Whoever did this wanted to steal drugs or money or both and guns and fireworks." (Tr. 2516). Attorney McVay's comment that the prosecutor was referring to was that after listening to nine days of testimony, "only today was it suggested that there was any reason whatsoever why James Brenson would kill Norman Duck Herrell." (Tr. 2467), in reference to the cross examination of Robin Shabazz, who testified that day.

{¶432} All in all, the references to Brenson's multiple aliases, use of different social security numbers, and his illegitimate children and extramarital affairs totaled sixty-nine.

{¶433} Initially, I find the admission of character evidence, specifically that of Appellant's previous personal relationships with women and the children produced as a

result of those various relationships, to have been allowed in error. The admission of evidence that Appellant was having an affair with one woman while married to another was highly prejudicial and inflammatory as it relates to both Appellant and Allen and certainly has no bearing on Appellant's or Allen's guilt. This is evidence admitted solely to tarnish the reputation of the accused. Moreover, evidence that Appellant fathered multiple children with different women is both irrelevant and highly inflammatory. Again, there is no good faith basis for the admission of such evidence against either codefendant. This evidence, by itself, could be considered harmless, but when coupled with the additional errors at trial, loses its harmless nature.

{¶434} Moreover, the multiple motions for mistrial provide a basis for an analysis of the harmless errors that were committed in this trial. As the majority has noted, the grant or denial of an order of mistrial lies within the sound discretion of the trial court. *State v. Glover* (1988), 35 Ohio St.3d 18, 517 N.E.2d 900; *State v. Widner* (1981), 68 Ohio St.2d 188, 190, 22 O.O.3d 430, 431, 429 N.E.2d 1065, 1066-1067. A jury is presumed to follow the instructions, including curative instructions, given it by a trial judge. See *State v. Loza* (1994), 71 Ohio St.3d 61, 75, 641 N.E.2d 1082, 1100, quoting *State v. Henderson* (1988), 39 Ohio St.3d 24, 33, 528 N.E.2d 1237, 1246. However, mistrials need be to declared when the ends of justice so require and a fair trial is no longer possible. *State v. Franklin* (1991), 62 Ohio St.3d 118, 127, 580 N.E.2d 1, 9.

{¶435} For instance, the testimony initially admitted regarding the October, 1999, search of Appellant's vehicle, which resulted in the seizure of a shotgun, shotgun shells, masks, knives, a D.E.A. hat, rubber gloves, and zip ties formed the basis for one of these "harmless" errors. This search took place *almost a year preceding* the murder of

Herrell and was only marginally relevant to Appellant's case. Appellant made a motion for mistrial after the introduction of this evidence. The trial court denied the motion and then trial counsel requested that Lieutenant Gorney's entire testimony be struck from the record as being violative of their clients' right to a fair trial.

{¶436} The court granted the motion to strike the testimony of Lieutenant Gorney, finding that "had the pictures of the gloves, duct tape, plastic ties being separated out . . . that would have been permitted under the 404(B) exception on identification. Unfortunately, it was all thrown in together by pictures with testimony with evidence excluded by 404(A) and, therefore, that was the reason that was excluded under 404."

{¶437} If this error were isolated, I would find that the trial court's curative instruction and the striking of Lieutenant Gorney's testimony following the eliciting of the inadmissible evidence was sufficiently curative and no mistrial was warranted. While the prosecution sought to properly admit evidence found in Appellant's car, i.e., the zip ties, knives, and gloves, they also admitted other irrelevant items found in the car. Those items included the D.E.A. hat, a shotgun, and ski mask among other things. The court, after hearing Lieutenant Gorney's testimony, determined that the prejudicial nature of the admission of such evidence far outweighed the probative value of such evidence. At that time, the court decided to strike the whole of Lieutenant Gorney's testimony. In so doing, the court instructed the jury as follows:

{¶438} "Folks, we heard testimony this morning from Lieutenant Gorney from the Toledo Police Department and at this point in time, I instruct you all to disregard his testimony in full, completely, strike it from your memory, treat it as though you never heard it."

{¶439} The trial court did not abuse its discretion in failing to order a mistrial on these grounds. Cf. *State v. Glenn* (1986), 28 Ohio St.3d 451, 455, 28 OBR 501, 504, 504 N.E.2d 701, 706; see *State v. Warren* (1990), 67 Ohio App.3d 789, 799, 588 N.E.2d 905, 912. While the admission of the evidence was error, I would find that error, by itself, would be harmless in light of the curative instructions given by the trial court. Taken with the other errors at trial, though, this error does not remain in the realm of harmless.

{¶440} Additionally, the parading of Allen's wife in front of the jury was error, albeit error that *by itself* may have been harmless.

{¶441} Appellant argues that the trial court should have granted a mistrial after the prosecutor called Allen's wife to the stand. These facts were discussed in the majority opinion, but bear reiterating for purposes of this analysis. Specifically, the facts giving rise to the motion for mistrial were as follows: The State had failed to successfully serve Silvy Allen with a subpoena prior to trial. After the trial had commenced, the prosecutor served Mrs. Allen with a subpoena when she accompanied her daughter to the courthouse to testify. Even though the prosecutor was able to serve Mrs. Allen with a subpoena at the courthouse, the prosecutors neglected to speak with her prior to calling her to the stand to determine if indeed she would cooperate and testify against her husband. Moreover, Mrs. Allen would have been in need of *Miranda* warnings and an attorney, as her DNA was found at the murder scene and she went to Florida with Appellant as well.

{¶442} During trial, in front of the jury, the prosecutor proceeded to call Mrs. Allen to the stand to testify. After she took the stand, prosecution asked the court if counsel could approach. At a sidebar conference, the following exchange was held:

{¶443} "[Prosecutor]: Your Honor, we are approaching prophylacticlly [sic], a thought had occurred that the witness might say at some point that she wished not to testify. Your honor, perhaps we should ask that question when the jury is not present. There is a privilege in this case although they weren't married until 2005, well after the murder, but anything we're asking her about was before they were married, not during covatures. [sic]"

{¶444} "The Court: Well, I think we should probably address it before.

{¶445} "[Prosecutor]: There's a competency issue that I don't want to come up in front of the jury.

{¶446} "The Court: Okay. I'll excuse the jury and we can address it.* * *"

{¶447} The following then occurred after the jury was dismissed from the courtroom and the witness was sworn:

{¶448} "The Court: Be seated, folks.

{¶449} "The Court: Do you want to inquire?

{¶450} "[Prosecutor]: Your honor, my understanding of the case law in this area, I think it would be appropriate for the court to ask questions of the witness regarding Evidence Rule 601.

{¶451} "The Court: Your name is Silvy Allen; is that right?

{¶452} "A: Silvy Sparks Allen.

{¶453} "Q: Silvy Sparks Allen?

{¶454} "A: Right.

{¶455} "* * *

{¶456} "Q: And you're currently married to Mr. William T. Allen, who is one of the defendants in this case?

{¶457} "A: That's correct.

{¶458} "Q: And when were you married?

{¶459} "A: I'm sorry. Under my stress I'm not going to be totally accurate. Maybe three years ago.

{¶460} "Q: This is 2008. So 2005 sometime?

{¶461} "A: Yes.

{¶462} "Q: And it's my understanding that you're electing to testify today; is that right?

{¶463} "A: No. And I'm also going to plead the fifth because I wish not to testify against my husband. This subpoena was just given to me momentarily ago. I accompanied my daughter who was subpoenaed.

{¶464} "Q: Okay. So you refuse to testify?

{¶465} "A: That's correct.

{¶466} "The Court: All right, what's your position on this, Mr. Rohrer?

{¶467} "[Prosecutor]: Your Honor, the strictures of Evidence Rule 601, I think, are pretty clear. I don't know that there's much leeway in this. I guess the only argument I would make - - having reviewed the case law, there's really no good faith argument I can make contrary to that, your honor. The competence issue applies at the time the witness is testifying, which is now and we have no reason to believe they're not married.

{¶468} "The Court: All right. Any statements for the regard on behalf of Mr. Allen?

{¶469} "Mr. Heald: No, your Honor.

{¶470} "The Court: All right, ma'am. You can step down.

{¶471} "* * *

{¶472} "Mr. Meyers: * * * We would, in retrospect, lodge an objection to what just transpired here, whereby if the government was aware, as obviously they were, that this witness was going to exercise her right not to testify, they should have brought that to the court's attention before parading her onto the stand. I'm sure I wasn't the only one in the room who watched everybody carefully watching her and now, obviously, they've implied, improperly that for some reason, I suppose not of their own making, they've sent the signal by just her physical presence that she's refused to testify. It's inappropriate and we object and move for a mistrial. It's no different than calling a witness you know who is going to take the Fifth and playing that hand in front of the jury.

{¶473} "Mr. Heald: Your Honor, we would join in the objection in that motion.

{¶474} "The Court: Does the State want to respond to the objection and motion?

{¶475} "[Prosecutor]: Your Honor, that's the exact reason I approached the bench before we asked the witness any questions, to address that issue because it popped up. We only served her with her subpoena about five minutes ago.

{¶476} "Mr. Meyers: Clearly, the State must have heard something out in that hallway that caused them to approach the bench. Why they waited until after they had the little parade or charade is inappropriate.

{¶477} "The Court: I was kind of curious about that myself.

{¶478} "[Prosecutor]: Your Honor, Mr. Mooney was in the hallway and had a conversation with the witness prior to that, too, and it wasn't raised by anyone else in the room except myself before the witnesses testified.

{¶479} "Mr. Meyers: We're certainly not privy to the conversations the government or its counsel or it's [sic] chief law enforcement agency has had with her. * * * We have known generally that they've been trying to serve Silvy Allen up in the Toledo area. If they've got a shot to protrusely [sic] drop an immediate subpoena on her and were apparently one or all total, all three together, state representative told by her, I'm not testifying, she most certainly has been paraded in front of this jury.

{¶480} "[Prosecutor]: She didn't say that, your honor. She told us she was refusing to accept a subpoena. Until we found her person and got her served personally with the subpoena, we couldn't force it. But we found her, we served her with a subpoena and she was in court. I had no conversations with her, Miss O'Brien had no conversations with her, Sergeant Leatherman had no conversations with her today.

{¶481} "Now, the look on her face lead [sic] me to believe that we should approach the bench before her answering any questions. I said something to her about our fair city, she said "I hate your fair city", or something to that effect. She did not tell me she did not want to testify."

{¶482} The court, in ruling on the motion for mistrial, stated as follows:

{¶483} "We have motions for mistrial pending on behalf of both defendants. I think it's the fourth motion for mistrial in this case, feeling that the substantial rights of their clients have been affected by the parading of Miss Allen in here in front of the jury.

And then Miss Allen's refusal to testify. Certainly, I agree with counsel that a simple question by Mr. Rohrer, do you wish to testify or not, would have handled it and not brought her in, nor probably the calling of her name in the courtroom, that he was calling her as a witness. And I'm not sure that's akin to putting someone on the stand to plead the Fifth when the prosecutor knows that the witness was going to do that, although it comes pretty close. In this case, the jury was excused and outside the presence of the jury the witness said that she didn't want to testify.

{¶484} "You know, frankly the court should have anticipated that except I found myself in the same position, wondering if she was coming in the courtroom, then she must be willing to testify. But it's something that is required to do if the spouse is going to testify, to bring them in in advance and say, do you wish to testify; you have a right not to testify. Has substantial prejudice been shown? No, nor has counsel really stated what the substantial prejudiced this would be [sic] except what inference the jury may or may not take from the fact that she was called in in front of them and then she did not testify. The court is going to give an instruction to the jury and the instruction would either be one that they are not to infer anything from the fact that Mr. Allen's wife refused to testify, or did not testify because our law says a spouse does not have to testify in a trial of her husband, if she so chooses, or the instruction would be that they are not to infer anything from the fact the witness was called to the stand and did not testify. So I can advise them of the law that allows her not to testify, or I can just tell them they're not to infer anything. With that instruction, first of all, I don't think there's any substantial prejudice here to the defendants, but certain the jury may infer

something that they probably shouldn't and what the consequences of that is, no one knows."

{¶485} I would find the parading of Mrs. Allen in front of the jury to be error. It is difficult to fathom how the State could legitimately argue that they did not know that Silvy Allen would refuse to testify when the prosecutor conceded that Mrs. Allen refused to accept a subpoena prior to trial, particularly when they did not even seek to speak with her prior to calling her to the stand at trial. Arguably, there is almost as much evidence that links Silvy Allen to the crime scene as there is her husband. Silvy Allen's DNA was found on the shirt left at the murder scene, and accordingly, she would have had a legitimate right to exercise her Fifth Amendment right not to testify. Moreover, she moved to Florida with Allen shortly after the crime was committed. If this were the sole motion for mistrial in the case, again, I would agree that any substantial prejudice was promptly remedied by the trial court's curative instruction to the jury, and therefore that error was harmless.

{¶486} I am troubled, though, by the inaccuracy of the trial court's instruction. A trial court should not have to misstate the law to the jury because the prosecutor committed an error.[22]

{¶487} The court instructed the jury, "When you left, we had a witness on the stand. That witness was a Mrs. Allen, the spouse of Defendant Allen, and under the laws of our state, we have rules, evidence rules, and there's [sic] rules of competency. For example, a person of unsound mind can't testify; a child under the age of ten can't

[22] The majority fails to cite any case law in support its assertion that the trial court's instruction was correct. There is no case law, as far as the dissent is aware, that supports the contention that it is ever appropriate for a trial court to purposely give a legally incorrect jury instruction.

testify. Likewise, a spouse cannot testify. So once I determined she was the spouse, she was not permitted to testify."

{¶488} It is simply not the law in Ohio that a spouse cannot ever testify in a court of law. While there are privilege and competency issues, to be sure, surrounding when a spouse can testify, the law is not, nor has it ever been, a blanket prohibition against a spouse testifying in court. The fact that the court had to go to such lengths to give a "curative" instruction to the jury, when the instruction was a misstatement of the law should signal to this Court that perhaps the error was not harmless, but in fact was severe enough to warrant a new trial.

{¶489} The prosecutor should have determined prior to calling Mrs. Allen to the stand whether or not she would cooperate and testify. Again, were this the only error that the prosecution committed that required a curative instruction following a motion for mistrial, I would find that no prejudice occurred because the court promptly instructed the jury to disregard Mrs. Allen as a witness and any error that occurred would be harmless. However, when coupled with additional errors at trial, this "harmless" error, along with other errors, become too much to ignore.

{¶490} A bell can only be unrung so many times. The culmination of these multiple errors became so overwhelming that a jury could not feasibly be expected to continue to disregard repeated violations of the rules.

{¶491} Though curative measures can in some cases obviate the necessity of a mistrial, it cannot always erase the taint of improper testimony. "The giving of a curative instruction will often obviate the necessity of a mistrial. However, there are some instances in which the prejudice is so great that it is impossible 'to unring the bell.'"

Tumblin v. State (2010), 29 So.3d 1093, quoting *Graham v. State*, 479 So.2d 824, 825-26 (Fla. 2d DCA 1985) (citation omitted).

{¶492} The prosecution's tactics in this trial were prejudicial and forced Appellant into a "no win" situation. Appellant was forced to repeatedly object and make a motion for mistrial four times in the trial below. While the court denied the motions, the court did indeed find fault with the prosecution's tactics and gave curative instructions.

{¶493} Based on the multiple errors in this trial, I cannot find that the Appellant received a fair trial. I find it hard to fathom if Appellant has not shown prejudice in the instant case, what it would take in order for any defendant to ever show prejudice. In the trial below, the jury heard over a week's worth of testimony which amounted to approximately 2,000 pages of transcript on review, received approximately 100 exhibits to review, and was charged with determining the guilt of Appellant and his codefendant on multiple complex charges of aggravated murder, murder, kidnapping, aggravated robbery and burglary.

{¶494} If prejudice cannot be shown based on the short amount of time that the jury deliberated on such a fact-intensive case with dozens of exhibits before convicting Appellant of everything that he was charged with, then I am at a loss as to how a defendant would ever show prejudice. I would reverse the conviction based on cumulative error and as I stated in *State v. Allen*, 5th Dist. No. 09-CA-13, --- Ohio ---, I would order that Appellant and his codefendant be retried separately so that justice could be fairly served.

{¶495} Finally, I conclude by noting that the majority, as it did in *State v. Allen,* Delaware App. No. 09-CA-13, ---- Ohio ----, continues to incorrectly follow federal law in

determining the appropriate test in ruling upon a motion to sever. See majority opinion, ¶¶ 102-112. The majority repeatedly states that Appellant has failed to show "compelling, specific, and actual prejudice" with respect to his severance argument. In so doing, the majority cites to the Sixth Circuit cases of *United State v. Saadey* (6th Cir. 1993), 393 F.3d 669 and *United States v. Driver* (6th Cir. 2008) 535 F.3d 424. Both of these cases deal with federal RICO charges and the severance of charges, not the severance of co-defendants. The majority fails to note that Ohio has not adopted this standard. See e.g., paragraph 203, infra.

{¶496} The majority also cites *United States v. Lloyd*, (6th Cir. 1993) 10 F.3d 1197, for the proposition that the "appellant bears the burden of making a strong showing of factually specific and compelling prejudice from a joint trial." See majority opinion, ¶ 112. However, the majority fails to point out that in *Lloyd*, the Sixth Circuit pointed out that "in reaching this conclusion, we view as significant the fact that the evidence against these defendants was simply overwhelming." Id. at fn. 22. Such is not the case here.

{¶497} Moreover, federal courts have held that state law severance claims are governed by State law, not by federal law. *U.S. v. Hutchinson* (6th Cir. 2002), 303 F.3d 720. *Phillips v. Million* (6th Cir. 2004), 374 F.3d 395, (wherein federal court pointed out that they must look to Kentucky law to determine whether the motion to grant severance should be granted. In addition, they stated that *Zafiro* involved the interpretation of Federal Rules of Criminal Procedure 8, 14, an 18, not the United States Constitution, and thus *Zafiro* had no precedential weight in reviewing state court proceedings on due

process grounds.) *Million*, at 393; see also *Perrou v. Jones* (E. D. Mich. 2009), No. 06-14941, 2009 WL 2392971.

{¶498} The standard, as cited by the majority, is simply not the standard for establishing severance in Ohio courts. That standard, as set forth in *State v. Torres* (1981), 66 Ohio St.2d 340, 343, 421 N.E.2d 1288, is as follows. "A defendant claiming error in the trial court's refusal to allow separate trials of multiple charges has the burden of affirmatively showing that his rights were prejudiced. *State v. Roberts* (1980), 62 Ohio St.2d 170, 175, 405, N.E.2d 247;* * *.; see also *State v. Hand*, 107 Ohio St.3d 378, 2006-Ohio-18, 840 N.E.2d 151; and *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, 837 N.E.2d 315. He must demonstrate that the trial court abused its discretion in refusing to separate the charges for trial. *Opper v. United States* (1954), 348 U.S. 84, 95, 75 S.Ct. 158, 165, 99 L.Ed. 101; Wright, Federal Practice and Procedure 468, Section 227. More specifically, he has the burden of furnishing the trial court with sufficient information so that it can weigh the considerations favoring joinder against the defendant's right to a fair trial." Other courts have held that "error is prejudicial if there is a reasonable probability that the verdict might have been more favorable to the defendant if the error had not been made." *Rolle v. State* (Wyo. 2010), 2010 WY 100, ___ P.3d ___, citing *Vigil v. State* (Wyo. 2010), 2010 Wy 15, 224 P.3d 31.

{¶499} For these reasons, I must dissent.

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JUDGE PATRICIA A. DELANEY

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
JAMES BRENSON	:	
Defendant-Appellant	:	CASE NO. 09-CA-18

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Delaware County, Ohio, is affirmed in part, reversed in part and remanded. Costs to be divided equally between the parties.

_____
HON. W. SCOTT GWIN

_____
HON. JOHN W. WISE

_____
HON. PATRICIA A. DELANEY