[Cite as *State v. Henry*, 2012-Ohio-5552.]

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

State of Ohio — Court of Appeals No. L-11-1157

Appellee — Trial Court No. CR0201002807

v.

Jimmy Henry — **DECISION AND JUDGMENT**

Appellant — Decided: November 30, 2012

* * * * *

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

Karin L. Coble, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Defendant-appellant, Jimmy Henry, appeals the June 20, 2011 judgment of the Lucas County Court of Common Pleas which, following a jury trial convicting him of two counts of felonious assault with firearms specifications, sentenced him to nine years of imprisonment. For the reasons that follow, we affirm appellant's conviction but reverse the portion of his sentence imposing costs.

{¶ 2} The relevant facts of this case are as follows. On October 7, 2010, appellant was indicted on five counts of felonious assault, in violation of R.C. 2903.11(A)(2), second degree felonies, all with firearms specifications. The charges stemmed from the shooting of two victims on September 21, 2010. Appellant entered a plea of not guilty to the charges.

{¶ 3} On December 2, 2010, appellant filed a motion to suppress arguing that he was not properly given his Miranda warnings. On the same date, appellant filed a motion to suppress the identification evidence arguing that it was unduly suggestive and not reliable.

{¶ 4} In January 2011, appellant's counsel withdrew due to his appointment as a common pleas judge. Appellant was appointed new counsel who appeared at a January 19, 2011 pretrial. On that date, the suppression hearing was scheduled for March 9, 2011. The suppression hearing was ultimately held on June 10, 2011, and the motions were denied.

{¶ 5} On June 14, 2011, a jury trial commenced and the following evidence was presented. Toledo 9-1-1 operator, Terri Ellis, testified that on September 21, 2010, at 8:14 p.m., a unit was dispatched to Vermont Avenue, in Toledo, Ohio, due to a call of gunshots fired into a residence. At 8:19 p.m., the unit arrived on the scene and spoke with the female resident who stated that someone had been shooting into her home. Ellis testified from the call log that the 9-1-1 caller stated that the shooters were "gang

members" and that they were after her boyfriend about "gang related stuff." The incident's close time indicates that the officers were on the scene for 59 minutes.

{¶ 6} Ellis testified regarding a second incident. At 9:36 the same evening, a 9-1-1 call was received that two persons were shot in front of Central Catholic High School. Victim Dorian Belcher made the call and described the suspect as driving a tan four-door car and having a short dreadlock hairstyle. The 9-1-1 call was played for the jury. During cross-examination, Ellis agreed that another 9-1-1 caller stated that there were black males shooting in the street.

{¶ 7} Toledo Police officer Timothy Sturtz and then-partner Jeffrey Middleton similarly testified that they responded to the first 9-1-1 call on Vermont. Upon arrival, they spoke with resident Lashonna Kincade who was very upset and stated that people were shooting into her house; her baby was inside. She stated that she believed that the shooting was related to her boyfriend's gang activity. Ms. Kincade revealed the identity of who she believed was the shooter; it was not the victims of the shooting later that night. The boyfriend eventually came outside and was later identified as appellant. Appellant left within ten minutes stating that he had to go to the store.

{¶ 8} Sturtz and Middleton then drove around the corner where they had a direct view of the front of the house and finished the report. They sat in the patrol vehicle for an additional ten minutes before leaving the scene. Sturtz stated that they did not see appellant return to the house.

{¶ 9} The officers testified that at approximately 9:36 p.m. they responded to a second call that two persons were shot in front of Central Catholic High School. Upon arrival, the officers observed two African American juveniles lying on the ground; they indicated that they had been shot. The officers admitted that the victims did not describe the suspect and that they did not recover any guns or shell casings in the area. The officers testified that the two shooting incidents were approximately one-half mile apart.

{¶ 10} The officers admitted that when appellant left the Vermont Avenue home, he was walked southbound toward Bancroft Street, away from the location of the later shooting. The officers also admitted that while parked facing the Vermont address they were not able to see the back door where appellant could have returned. Further, the officers acknowledged that the victims stated a tan four-door vehicle was involved and that there were two individuals in the vehicle, both with short dreadlocks.

{¶ 11} Officer Herb Higgins, of the Toledo Police Gang Task Force, testified that he responded to a shooting at Central Catholic High School. Officer Higgins testified that victim, Eric Saunders, told him that the shooter was a black male, stocky build, with short dreadlocks. Saunders indicated that he had previously seen the shooter and, given the opportunity, would be able to identify him.

{¶ 12} Officer Higgins stated that he talked with victim, Dorian Belcher, at the emergency room. Belcher described the suspect as a black male with dreadlocks. Belcher also indicated that the suspect was on his Facebook page. Higgins testified that he gave the information to the detective assigned to the case.

{¶ 13} Toledo Police Sergeant Bill Wauford testified that he responded to the shooting call at Central Catholic High School. Sergeant Wauford testified that the victims had been riding a bicycle, one pedaling and one riding on the handlebars, when the shooting commenced. Wauford identified several photographs of the scene.

{¶ 14} Sergeant Wauford then testified about the procedure for and use of photo arrays. Wauford acknowledged the recent statutory changes relative to photo arrays and then proceeded to outline the procedures used by the Toledo Police Department. Sergeant Wauford stated that the individual who prepares the photo array does not show the photo array; in other words, they use a "blind" administrator.

{¶ 15} Sergeant Wauford testified that other officers involved in the case gave him a description of the suspect. Wauford testified he uses a computer program to compile the photo array. The program allows him to enter physical characteristics such as race, height, weight, hair color and style, facial hair, and eye color. Wauford then identified the photo array he prepared in the case; he prepared two identical arrays to present to each victim. Sergeant Wauford then gave the arrays to Detective Cooper to show the victims.

{¶ 16} Toledo Police Detective Raynard Cooper testified that he assisted in the shooting investigation. On the night of the shooting, he and Detective Scott Smith went to the hospital to talk with the victims. Cooper stated that he overheard victim Belcher stating that, though he did not know the individual's name, he had seen him on a social networking website. Belcher was then provided with a laptop computer and accessed his

Facebook account. Cooper was then presented with a photograph printed out from a Facebook page which depicted a group of individuals. According to Cooper, Belcher identified the shooter as the individual in the bottom left corner of the photograph.

{¶ 17} Detective Cooper was then questioned about the photo arrays prepared by Sergeant Wauford. Cooper stated that the day after the shooting, Toledo Police Detective Willie Johnson retrieved the arrays, contained in a folder, from Wauford and the two proceeded to the hospital where, at approximately 9:50 p.m., they showed the array to Dorian Belcher. They told Belcher to take his time, that he was not obligated to identify anybody, and that the suspect may or may not be in the array. Cooper stated that Belcher immediately pointed to appellant, who was in position number four. Detective Cooper testified that he did not suggest in any way who Belcher should pick. Cooper further stated that he did not know which picture was appellant's.

{¶ 18} Next, after finding out that he had been discharged, the two went to Eric Saunders' home. They brought Saunders out on his front porch, away from friends and family members, and showed him the photo array. Again, as with Belcher, they told him to take his time and that the suspect may or may not be included in the photos. Saunders also selected number four, appellant's photo. Saunders signed the photo at 10:15 p.m.

{¶ 19} During cross-examination, Detective Cooper was questioned regarding Belcher's initial identification of appellant from a Facebook page. Cooper stated that he did not give Sergeant Wauford the information and was not certain who did. Cooper admitted that in the 24 hour period between Belcher pulling up the Facebook photo and

the photo array presentation, Belcher and Saunders could have spoken to each other but that Belcher indicated that they had not spoken.

{¶ 20} Toledo Police Detective Scott Smith testified that on September 22, 2010, he was called to Central Catholic High School where a student found a bullet on a classroom floor. They also observed a hole in the classroom window. Smith testified that he retrieved the projectile and that, upon observation, he believed that it came from a larger caliber handgun. Smith also collected five .40 caliber shell casings on the sidewalk across from the high school. Smith admitted that the casings and projectile may not be related to the shooting the night before and could have come from different firearms.

{¶ 21} Shooting victim, Dorian Belcher, testified that on the night of the shooting he and his cousin, Eric Saunders, were riding on a bicycle. Saunders was pedaling the bike and Belcher was riding on the handlebars. Belcher stated that they observed a man sitting by a tree while talking on his cell phone and "playing" with a gun. Belcher stated that a few seconds later he "ran down" on them with the gun. According to Belcher, the shooter noticed Saunders' shirt which had a photo of deceased gang members "Vito" and "Man-man." Belcher stated that the individuals were from a rival gang. Belcher stated that he and Saunders began running and were both shot. Saunders was shot in his right leg and Belcher stated that he was shot in the back. He called 9-1-1.

{¶ 22} Belcher stated that once he got to the hospital he recalled that he saw the shooter on Facebook; a laptop computer was provided to him. Belcher testified that he went on one of appellant's friend's Facebook page and showed detectives a photograph

with several individuals; he pointed out appellant who was wearing a shirt that said "600 Fernwood Ave." and a New York Yankees hat. Belcher was shown the photo in court and again pointed to appellant as the individual who shot him.

{¶ 23} Belcher testified that he selected appellant's photo from the photo array and signed and dated the form. Belcher then identified appellant in court as the individual who shot him. Belcher further stated that he and Saunders were told not to come in and testify against appellant; Saunders did not appear.

{¶ 24} During cross-examination, Belcher stated that he did not see any vehicles or any other individuals immediately prior to the shooting. When questioned about Saunders' shirt he explained that Vito, or Lavar, was pictured on the front and Man-man, or Marquis, was on the back and that both were deceased. Belcher explained that the shooter bent over to look at the back of Saunders' shirt.

{¶ 25} Belcher testified that he did not see how the shooter got away but did remember that when they were riding the bike, Saunders commented on two males who turned to look at them while driving by.

{¶ 26} Toledo Police Detective Regina Lester testified that she was called to meet the shooting victims at the hospital. Detective Lester stated that she provided Belcher with the laptop so he could access his Facebook account. Lester stated that by linking through several profile pages Belcher was able to access the photo wherein he identified appellant as the shooter. Detective Lester described that they eventually discovered appellant's name through officers who had worked in the district. A photo array was

compiled and after the victims both chose appellant as the shooter, an arrest warrant was issued.

{¶ 27} Detective Lester was questioned about a possible second individual being involved in the shooting. Belcher indicated that a Donate Johnson may have been driving the vehicle. Johnson was also depicted in the Facebook photo. Detective Lester was shown a booking photograph of Johnson and she admitted that his hairstyle was similar to appellant's. Lester admitted that they were unable to locate Johnson.

{¶ 28} Detective Lester was also questioned about her interview, and written report, with Dorian Belcher 13 days after the shooting. Belcher stated that he and his cousin were advised not to ride the bicycle on Fulton Street because the "Fernwood boys" would try and shoot them.

{¶ 29} Lucas County Corrections officer, Jim O'Neal, testified regarding the pin numbers assigned to each inmate at the Lucas County Jail and how that number is used to monitor telephone conversations. Appellant's first jail call to his girlfriend was then played to the jury. The gist of the call was that appellant and Lashonna were establishing the alibi that after appellant left the house on Vermont, he went directly to the IGA store and returned within five minutes and remained at the house all night. Lashonna stated that the incident would have never happened if "they'd never seen Johnson on my motherfuckin' balcony."

{¶ 30} Following trial and deliberations, the jury found appellant guilty of two counts of felonious assault with firearm specifications. Appellant was immediately sentenced to a total of nine years of imprisonment. This appeal followed.

{¶ 31} On appeal, appellant raises the following eight assignments of error for our consideration:

> Assignment of Error One: Appellant's right to a speedy trial was violated.
>
> Assignment of Error Two: Law enforcement and the trial court failed to follow the requirements of R.C. 2933.83 with respect to the photo array. This error should be reviewed pursuant to a harmless error analysis.
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> Assignment of Error Three: The trial court erred in denying appellant's motion to suppress the photo array.
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> Assignment of Error Four: Prosecutorial misconduct occurred to the substantial prejudice of appellant.
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> Assignment of Error Five: Appellant's trial counsel rendered ineffective assistance of counsel.
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> Assignment of Error Six: The convictions are supported by insufficient evidence and are against the manifest weight of the evidence.
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> Assignment of Error Seven: Cumulative error deprived appellant of a fair trial.
>
> Assignment of Error Eight: The trial court erred in imposing costs.

{¶ 32} In appellant's first assignment of error he contends that his constitutional right to a speedy trial was violated. Specifically, appellant argues that the delay between his filing of the motions to suppress and the hearing was due to his counsel's disqualification and appointment of new counsel which was no fault of his own. Thus, appellant asserts that the statutory period should not have been tolled.

{¶ 33} The right to a speedy trial is guaranteed by the United States and Ohio Constitutions. *State v. Adams*, 43 Ohio St.3d 67, 68, 538 N.E.2d 1025 (1989). Pursuant to R.C. 2945.71(C)(2), a person charged with a felony shall be brought to trial within 270 days of his arrest. Further, each day an accused is held in jail in lieu of bail on the pending charge is counted as three days for purposes of computing the time limit. R.C. 2945.71(E). "This 'triple count' provision applies only when the defendant is being held in jail solely on the pending charge." *State v. Sanchez*, 110 Ohio St.3d 274, 2006-Ohio-4478, 853 N.E.2d 283, ¶ 7. Therefore, if an accused is held in jail solely on the pending charge for the entire time from arrest to trial, he must be brought to trial within 90 days. The time by which an accused must be brought to trial, however, may be tolled under certain conditions, including:

> (E) Any period of delay necessitated by reason of a * * * motion, proceeding, or action made or instituted by the accused;
>
> * * *

(H) The period of any continuance granted on the accused's own motion, and the period of any reasonable continuance granted other than upon the accused's own motion[.] R.C. 2945.72

{¶ 34} Thus, where an accused requests a continuance of a pretrial that request tolls the statutory speedy trial period from the date of the request until the date of the rescheduled hearing. *State v. Grissom*, 6th Dist. No. E-08-008, 2009-Ohio-2603, ¶ 15. Similarly, the Supreme Court of Ohio has definitively established that an accused's demand for discovery or a bill of particulars is a tolling event pursuant to R.C. 2945.72(E). *State v. Brown*, 98 Ohio St.3d 121, 2002-Ohio-7040, 781 N.E.2d 159, syllabus. In addition, the state and federal rights to a speedy trial can be waived in writing or in open court on the record. *State v. King*, 70 Ohio St.3d 158, 637 N.E.2d 903 (1994), syllabus. In this regard, when an accused signs an unlimited waiver of his right to a speedy trial, the accused may not seek dismissal of the criminal charges against him on speedy trial grounds "unless the accused files a formal written objection and demand for trial, following which the state must bring the accused to trial within a reasonable time." *State v. O'Brien*, 34 Ohio St.3d 7, 516 N.E.2d 218 (1987), paragraph two of the syllabus.

{¶ 35} "It is well established that once an accused has demonstrated that the applicable speedy-trial time has expired, he or she has established a prima facie case for dismissal, and the burden shifts to the state to demonstrate any tolling or extensions of time permissible under the law." *State v. McDonald*, 153 Ohio App.3d 679, 2003-Ohio-

4342, 795 N.E.2d 701, ¶ 27 (8th Dist.). Where an appellant fails to file a motion to dismiss in the trial court, an appellate court will review the error under a plain error standard. *See State v. Conkright*, 6th Dist. No. L-06-1107, 2007-Ohio-5315, ¶ 20. Plain error is found where an obvious defect in the proceedings affects a substantial right. Crim.R. 52(B).

{¶ 36} The parties do not dispute that appellant was incarcerated for 264 days. Appellant contends, however, that 139 days were not tolled which, utilizing the triple-count provision of R.C. 2945.72, yields 417 days. Conversely, the state argues that 215 days were tolled and that only 49 days were subject to being triple counted totaling 147 days.

{¶ 37} While the parties differ regarding the events triggering certain days tolled, the pivotal dispute are the days between appellant's filing of his motions to suppress, December 2, 2010, and the hearing on the motions, June 10, 2011. Between those dates, appellant concedes the following events tolled the time charged against the state: (1) the period between appellant's motion to suppress filed on December 2, 2010, and the discharge and appointment of new counsel on January 12, 2011, and (2) appellant's request for a continuance on March 9, 2011, through the hearing date of June 10, 2011. However, appellant asserts that the time between the appointment of new counsel in January until his request for a continuance on March, a total of 56 days, should be chargeable against the state. The state disagrees.

{¶ 38} As set forth above, the time for which an accused must be brought to trial may be tolled due to the accused's own motion or request. If the accused did not request a continuance, the time may still be tolled if the delay is considered "reasonable." During the period at issue, appellant's counsel was disqualified due to his appointment as a Lucas County Common Pleas Judge and, in addition, a new judge was assigned to the courtroom. Certainly these events reasonably necessitated additional time for replacement counsel and trial judge to familiarize themselves with the case. Accordingly, we find that the delay was reasonable and appellant was not denied the right to a speedy trial. Appellant's first assignment of error is not well-taken.

{¶ 39} Appellant's second assignment of error asserts that law enforcement and the trial court failed to comply with the newly enacted requirements under R.C. 2933.83 with regard to the photo arrays presented to the victims. Specifically, appellant contends that law enforcement failed to use a "blind" or "blinded" administrator for the array.

{¶ 40} R.C. 2933.83, effective July 2010, requires any law enforcement agency that conducts live and photo lineups to adopt "specific procedures" for conducting the lineups. R.C 2933.83(B). Such procedures must provide, at minimum, the use of a "blind or blinded" administrator for the array. *Id.* at 2933.83(B)(1). Blind or blinded administrators are defined in R.C. 2933.83(A) as follows:

> (2) "Blind administrator" means the administrator does not know the identity of the suspect. "Blind administrator" includes an administrator

who conducts a photo lineup through the use of a folder system or a substantially similar system.

(3) "Blinded administrator" means the administrator may know who the suspect is, but does not know which lineup member is being viewed by the eyewitness. "Blinded administrator" includes an administrator who conducts a photo lineup through the use of a folder system or a substantially similar system.

{¶ 41} The folder system set forth in the statute provides for the suspect's photograph, five filler photographs and four dummy folders. The folders are shuffled and the administrator does not know which folder the witness is viewing. R.C. 2933.83(A)(6). The statute does not require the use of the folder system.

{¶ 42} The statute further provides that evidence of noncompliance with the statute shall be considered by courts in ruling on a defendant's motion to suppress. R.C. 2933.83(C)(1). In addition, such evidence is admissible at trial. R.C. 2933.83(C)(2). If such evidence is admitted at trial, the court shall instruct the jury that such noncompliance may be considered in determining the credibility of the witness identification. R.C. 2933.83(C)(3).

{¶ 43} At the June 10, 2011 suppression hearing, Detective Cooper testified that the policies and procedures of the Toledo Police Department provide that the lead investigator on a case generally compiles the photo array and an independent person

administers it. Cooper admitted that he saw the photo of appellant on the Facebook page that Dorian accessed; however, he did not know the identity of the individual.

{¶ 44} Cooper stated that Sergeant Wauford created the photo array after learning the identity of the suspect. The array consisted of six photographs. The individuals had similar skin tone and hairstyles. Cooper and another officer administered the array.

{¶ 45} Upon review of the suppression hearing and the trial testimony, the officers did not strictly comply with the blind or blinded administrator component of R.C. 2933.83 because Detective Cooper saw appellant's photo on Facebook. However, this does not necessarily result in reversible error.

{¶ 46} As will be discussed in our analysis of appellant's next assignment of error under R.C. 2933.83, noncompliance is to be taken into consideration by the trial court when ruling on a motion to suppress. It, however, does not necessitate that the court suppress the identification. The overriding analysis remains whether the procedure was "impermissibly suggestive." *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). Further, only if such evidence is introduced at trial does the statute require a jury instruction. Here, appellant admits that counsel did not argue noncompliance with the statute during trial. Appellant's second assignment of error is not well-taken.

{¶ 47} In his third assignment of error, appellant contends that the trial court erred when it denied his motion to suppress the photo array. Review of a trial court's denial of a motion to suppress presents mixed questions of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. "When considering a motion to

suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses." *Id.*, citing *State v. Mills*, 62 Ohio St.3d 357, 366, 582 N.E.2d 972 (1992). An appellate court defers to a trial court's factual findings made with respect to its ruling on a motion to suppress where the findings are supported by competent, credible evidence. *Id.*; *State v. Brooks*, 75 Ohio St.3d 148, 154, 661 N.E.2d 1030 (1996). "[T]he appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard." *Burnside* at ¶ 8, citing *State v. McNamara*, 124 Ohio App.3d 706, 707 N.E.2d 539 (4th Dist.1997).

{¶ 48} In *Neil v. Biggers*, *supra*, the United States Supreme Court considered due process limitations on the use of evidence derived through suggestive identification procedures. The court utilized a two-prong analysis stating that "[w]hen a witness has been confronted with a suspect before trial, due process requires a court to suppress her identification of the suspect if the confrontation was unnecessarily suggestive of the suspect's guilt and the identification was unreliable under all the circumstances." *State v. Waddy*, 63 Ohio St.3d 424, 438, 588 N.E.2d 819 (1992), *superseded by constitutional amendment on other grounds*, citing *Neil*, 409 U.S. 188; *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977). The first question is whether the identification procedure was unnecessarily suggestive of the defendant's guilt. *Waddy* at 438. The second, "is whether, under all the circumstances, the identification was reliable, i.e., whether suggestive procedures created 'a very substantial likelihood of irreparable

misidentification.'" *Id.* at 439, quoting *Simmons v. United States*, 390 U.S. 377, 384, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968).

{¶ 49} Appellant's central argument is that in denying appellant's motion to suppress the eyewitness identification, the trial court neglected to consider law enforcement's failure to comply with the newly enacted statutory procedures for photo lineups. We disagree. In its memoranda, the state clearly referenced the statutory changes regarding photo lineups, even attaching a copy of R.C. 2933.83 to its supplemental brief. During the suppression hearing, the state again questioned Detective Cooper about the steps the police department was taking to comply with the statutory changes. The evidence showed that while Sergeant Wauford prepared the array, Detectives Cooper and Johnson showed them to the victims. Neither the victim, Dorian Belcher, nor Cooper knew appellant's name or how it was discovered from the Facebook photo.

{¶ 50} Denying the motion to suppress, the court found that appellant failed to meet his burden to demonstrate that the procedure used in compiling and showing the arrays to the victims was unduly suggestive. Reviewing the trial court's finding, we find that no error occurred.

{¶ 51} Even if the statutory provision requiring a "blind" or "blinded" administrator was violated, the evidence presented shows that the arrays and their presentation were not unduly suggestive. The photos were of six African American individuals, about the same age, with similar skin tones and hairstyles. Further there was

testimony presented that the victims were informed that they were under no obligation to choose anyone from the array and that the suspect may or may not be included. Additionally, we agree with the state's argument that the fact that Belcher was independently able to locate appellant's photo on Facebook (which was not the photo used in the array) should not be used as a factor undermining the reliability of the photo array identification. The victims were certain that the photo each picked, appellant's photo, was the individual who shot them. Appellant's third assignment of error is not well-taken.

{¶ 52} Appellant argues in his fourth assignment of error that prosecutorial misconduct resulted in substantial prejudice to appellant. Specifically, appellant argues that the state's multiple references that appellant was a member of a gang were not supported by the evidence at trial and were used simply to elicit fear of the defendant by the jury.

> "The test for prosecutorial misconduct is whether the [conduct was] improper and, if so, whether the [conduct] prejudicially affected the accused's substantial rights." *State v. Cr*isp, 3d Dist. No. 1-05-45, 2006-Ohio-2509, ¶ 10, quoting *State v. Twyford*, 94 Ohio St.3d 340, 354-355, 2002-Ohio-894. In order to grant a new trial for prosecutorial misconduct, we cannot merely find that the acts of the prosecutor are culpable, but must also find that these acts detrimentally affected the fairness of the proceedings. *Twyfor*d, 94 Ohio St.3d at 355, citing *Smith v. Phillips*

(1982), 455 U.S. 209, 219. *State v. Jones*, 6th Dist. No. L-09-1002, 2010-Ohio-4054, ¶ 47.

{¶ 53} Further, because trial counsel did not object to the prosecutor's statements we review the alleged misconduct for plain error. *State v. Hanna*, 95 Ohio St.3d 285, 2002-Ohio-2221, 767 N.E.2d 678, ¶ 77, 84. Plain error may only be found where it is clear that absent the improper comments, the defendant would not have been convicted.

{¶ 54} Appellant admits that gang affiliation of both the victims and appellant were central to both the state and defense strategies. The state attempted to prove that appellant, in retaliation for his girlfriend's home being shot into, shot the first rival gang members he encountered. Conversely, defense counsel attempted to show that the victims identified appellant as the shooter solely because of his rival gang affiliation.

{¶ 55} At trial, victim Dorian Belcher freely admitted his Crips gang affiliation. Belcher further stated that the shooter was aware of him and his cousin's affiliation due to his cousin's shirt which had photographs of two deceased Crips members. Regarding appellant's Bloods gang membership, officers Sturtz and Middleton stated that appellant's girlfriend informed them that the shooters were looking for her baby's father due to his gang activity. In addition, the 9-1-1 operator who received the girlfriend's call testified as to the report which had the girlfriend's statement that the shooters were gang members who were after appellant "about gang related stuff."

{¶ 56} There was also extensive testimony about the Facebook photograph which depicted appellant and several friends. Appellant had on a "600 Fernwood Ave." shirt

which testimony provided was an offshoot Bloods gang. Further, appellant and many of the individuals in the photo were making reputed gang symbols with their hands.

{¶ 57} Accordingly, although appellant correctly states that eliciting testimony about gang membership may create a risk of prejudice, *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, 854 N.E.2d 150, we find that the testimony was admissible to show motive and makes appellant's guilt more likely than without the evidence. *Id.* at ¶ 170. Thus, we find no plain error in the state's act of eliciting testimony about gang involvement. Further, the prosecutor's questions regarding whether or not victim Eric Saunders was paid off or threatened to not appear for trial was not misconduct. Such questioning was used to explain victim Eric Saunders' absence at trial. Moreover, the state filed two notice of intent to use hearsay statements, pursuant to Evid.R. 804(B)(6), forfeiture by wrongdoing. Appellant's fourth assignment of error is not well-taken.

{¶ 58} Next, in appellant's fifth assignment of error he contends that he was denied the effective assistance of trial counsel. Appellant argues that counsel failed to file a motion to dismiss based on speedy trial grounds, failed to argue the application of R.C. 2933.83, failed to object to the prosecutor's comments about a witnesses being threatened or "paid off" to not appear, failed to move defendant's Exhibit A, Detective Lester's supplemental report into evidence, and failed to object to the court's refusal to give the jury Lester's report upon request.

{¶ 59} To prevail on a claim of ineffective assistance of counsel, a defendant must prove two elements: "First, the defendant must show that counsel's performance was

deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Proof of prejudice requires a showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694; *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph three of the syllabus. Further, debatable strategic and tactical decisions may not form the basis of a claim for ineffective assistance of counsel. *State v. Phillips*, 74 Ohio St.3d 72, 85, 656 N.E.2d 643 (1995).

{¶ 60} We first note as to the speedy trial argument, we specifically found that appellant's speedy trial right was not violated; thus, there is no reasonable probability that counsel would have been successful had he filed a motion to dismiss on that basis. Next, although appellant's counsel could have raised the issue of noncompliance with R.C. 2933.83 at trial, we cannot say that his failure affected the outcome of the trial. At the hearing on appellant's motion to suppress, newly enacted R.C. 2933.83 was discussed and, reviewing *Neil v. Biggers*, the motion was ultimately denied. Moreover, the jury was given the general credibility instruction. Regarding the prosecutor's comments about Saunders being "paid off" or threatened not to appear, as discussed above the questioning was used to explain why Saunders failed to appear for trial.

{¶ 61} Finally, appellant argues that counsel was ineffective by failing to move Detective Regina Lester's supplemental report into evidence and failing to object when, upon the jury's request, the court refused to give the report. Appellant argues that the report contained exculpatory evidence. Reviewing the report, we find that appellant's counsel could have reasonably been employing a trial strategy when it failed to move the exhibit into evidence. The report contains information that appellant's girlfriend changed her story of the events of the night of the shooting to give appellant an alibi. The narrative does describe that a tan vehicle was involved and that Donate Johnson was the driver of the vehicle. Both victims stated that after seeing the vehicle and riding the bicycle a few more blocks they encountered the passenger of the vehicle on foot and holding a gun. Further because the report was not entered into evidence, the trial court did not err when it refused to give it to the jury.

{¶ 62} Based on the foregoing, we find that appellant was not denied the effective assistance of counsel. Appellant's fifth assignment is not well-taken.

{¶ 63} Appellant's sixth assignment of error argues that appellant's convictions were not supported by sufficient evidence and were against the manifest weight of the evidence. Sufficiency of the evidence and manifest weight of the evidence are quantitatively and qualitatively different legal concepts. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). Sufficiency of the evidence is purely a question of law. *Id.* Under this standard of adequacy, a court must consider whether the evidence was sufficient to support the conviction as a matter of law. *Id.* The proper analysis is

"'whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.'" *State v. Williams*, 74 Ohio St.3d 569, 576, 660 N.E.2d 724 (1996), quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶ 64} In contrast, a manifest weight challenge questions whether the state has met its burden of persuasion. *Thompkins* at 387. In making this determination, the court of appeals sits as a "thirteenth juror" and, after

> "reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines 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. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Id.*, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶ 65} Appellant was convicted of two counts of felonious assault, R.C. 2903.11(A)(2) which required that the state prove that appellant knowingly caused or attempted to cause, physical harm to another. It is undisputed that the victims were shot with a firearm; the central issue was the identity of the shooter. Upon review, we find

that there was both sufficient evidence that appellant was the shooter and that his convictions were not against the manifest weight of the evidence.

{¶ 66} At trial, testimony was presented showing that appellant, a member of a gang, was at his girlfriend's house when it was shot into by rival gang members. Shortly after the shooting, appellant left on foot and while the officers were still at the girlfriend's residence, they did not see him return. Victim Dorian Belcher identified appellant from a Facebook photograph and then from a photo array; Belcher also identified appellant in court. Within 20 minutes of Belcher, victim Eric Saunders also identified appellant from a photo lineup.

{¶ 67} Accordingly, we find that appellant's convictions were supported by sufficient evidence and that the jury, in finding Belcher's testimony to be credible, did not lose its way or create a manifest miscarriage of justice. Appellant's sixth assignment of error is not well-taken.

{¶ 68} In his seventh assignment of error, appellant contends that the cumulative errors in this case deprived him of a fair trial. We have stated that "although a particular error by itself may not constitute prejudicial error, the cumulative effect of the errors may deprive a defendant of a fair trial and may warrant the reversal of his conviction." *State v. Hemsley*, 6th Dist. No. WM-02-010, 2003-Ohio-5192, ¶ 32, citing *State v. DeMarco*, 31 Ohio St.3d 191, 509 N.E.2d 1256 (1987), paragraph two of the syllabus. "'However, in order even to consider whether "cumulative" error is present, we would first have to

find that multiple errors were committed in this case.'" *Hemsley* at ¶ 32, quoting *State v. Madrigal*, 87 Ohio St.3d 378, 398, 721 N.E.2d 52 (2000).

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

{¶ 70} Appellant's eighth and final assignment of error argues that the trial court erred by imposing the costs of the prosecution. Although R.C. 2947.23(A)(1) mandates that, "[i]n all criminal cases * * * the judge or magistrate shall include in the sentence the costs of prosecution," the Ohio Supreme Court held that it was error for the trial court to impose those costs without orally notifying the criminal defendant. *State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954, 926 N.E.2d 278, ¶ 22. In addition to notifying a defendant about the imposition of costs, the court is also required to notify a defendant that if he fails to pay those costs "the court may order the defendant to perform community service in an amount of not more than forty hours per month until the judgment is paid or until the court is satisfied that the defendant is in compliance with the approved payment schedule." R.C. 2947.23(A)(1)(a); *State v. Ruby*, 6th Dist. No. S-10-028, 2011-Ohio-4864, ¶ 41-42, citing *State v. King*, 6th Dist. No. WD-09-069, 2010-Ohio-3074, ¶ 12. The remedy for this error is to remand the cause for the limited purpose of allowing the court to notify appellant about the community service provision and for appellant to object.

{¶ 71} Accordingly, because the trial court did not inform appellant of the potential imposition of community service, appellant's eighth assignment of error is well-taken.

{¶ 72} On consideration whereof, we find that appellant's convictions for felonious assault with a firearm specification are affirmed. The judgment of the Lucas County Court of Common Pleas as to the imposition of costs, under R.C. 2947.23, is reversed and the cause is remanded for the proper notifications under that section. Pursuant to App.R. 24, appellee, the state of Ohio, is ordered to pay the costs of this appeal.

Judgment affirmed in part
and reversed in part.

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

Peter M. Handwork, J. _______________________________
JUDGE

Mark L. Pietrykowski, J.
____

Thomas J. Osowik, J. JUDGE
CONCUR.
____
JUDGE

This decision is subject to further editing by the Supreme Court of
Ohio's Reporter of Decisions. Parties interested in viewing the final reported
version are advised to visit the Ohio Supreme Court's web site at:
http://www.sconet.state.oh.us/rod/newpdf/?source=6.