

the state, appellant hit the girl twice in the head, knocking her from her seat and to the ground with the second blow. Appellant claims that he merely 'popped' or 'tapped' her on the top of the head because she was 'throwing a fit' due to his refusal to order a pop for her rather than orange juice. In response to the altercation, a group of customers approached appellant in order to intervene. As a result, appellant left the restaurant with his daughter and went to the office of his attorney where he asked that police be called.

{¶3} Following a jury trial in May of 2010, appellant was found guilty of domestic violence. Thereafter, he was sentenced to 180 days in jail, with the sentence suspended on condition of completing one year of community control.

{¶4} Appellant now appeals his conviction, advancing three assignments of error for review.

{¶5} Assignment of Error No. 1:

{¶6} "THE TRIAL COURT ERRED BY REFUSING TO PERMIT EVIDENCE OF BIAS AND MOTIVE OF PERSONS AT THE SCENE AND THE DEFENDANT." [sic]

{¶7} Appellant argues that the court erred in failing to allow him to introduce evidence that would reveal a hostile history with Shane Huff, a member of the group of McDonald's customers who confronted him.

{¶8} "The admission or exclusion of relevant evidence rests within the sound discretion of the trial court." *State v. Sage* (1987), 31 Ohio St.3d 173, paragraph two of the syllabus. An appellate court will not disturb evidentiary rulings absent an abuse of discretion that produced a material prejudice to the aggrieved party. *State v. Roberts*, 156 Ohio App.3d 352, 2004-Ohio-962, ¶14. An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude was unreasonable, arbitrary, or unconscionable. *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, ¶181. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial

court. *State v. Atkinson*, Warren App. No. CA2009-10-129, 2010-Ohio-2825, ¶7.

{¶9} Appellant asserts that he and Huff were longtime enemies, dating back to an incident that occurred approximately 20 years ago. The trial court sustained the prosecutor's objections as to the relevance of appellant's attempts to introduce this evidence through testimony of other witnesses. He argues that he should have been permitted to introduce evidence of this history through those witnesses in order to reveal bias and motive of persons at the scene on the day in question.

{¶10} Under Evid.R. 616(A), any witness can be impeached by a showing of prejudice, bias, interest, or motive through examination or by extrinsic evidence. The impeachment evidence must be relevant as required by Evid.R. 402. We find that the evidence of Huff's hostile history with appellant is irrelevant. Appellant has provided no evidence that the conflict between he and Huff continued beyond the incident 20 years ago. Furthermore, Huff did not testify during the trial, he was not called as a witness, and his written statement to police was not introduced into evidence. Finally, appellant failed to establish that Huff influenced any of the other witnesses to testify in one manner or another. In fact, the record does not indicate that any of the witnesses were aware that Huff had any prior involvement with appellant.

{¶11} Based on the foregoing, we find that the trial court did not abuse its discretion in failing to admit evidence of appellant's prior involvement with Huff. Accordingly, appellant's first assignment of error is overruled.

{¶12} Assignment of Error No. 2:

{¶13} "THE TRIAL COURT ERRED BY PERMITTING THE PROSECUTOR TO MAKE NUMEROUS FALSE ARGUMENTS, ARGUMENTS NOT BASED ON EVIDENCE, IMPROPER CROSS EXAMINATION, IMPROPER IMPEACHMENT AND FALSE CLAIMS BEFORE THE JURY."

{¶14} Appellant argues that prosecutorial misconduct was committed on a number of occasions, resulting in an unfair trial. The test for prosecutorial misconduct is whether the remarks were improper and, if so, whether the remarks prejudicially affected the accused's substantial rights. *State v. Lott* (1990), 51 Ohio St.3d 160, 165, citing *State v. Smith* (1984), 14 Ohio St.3d 13, 14-15. The touchstone of this analysis "is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S.Ct. 940. Thus, prosecutorial misconduct will not be grounds for reversal unless it so tainted the proceedings that it deprived the defendant of a fair trial. *Id.* at 221.

{¶15} Appellant argues that he was prejudiced when the prosecutor sneered, made inflammatory argument, and stated that "the meaning of physical harm includes pain," during the opening statements. He also asserts that the prosecutor, during voir dire, asked the jury if they would hold it against the state that they could not force appellant to testify. He next argues that a police officer was improperly permitted to testify that injury is not relevant to a domestic violence charge. Appellant further argues that the prosecutor attempted to admit improper character evidence by asking a witness about appellant's tattoos. A review of the record, however, shows that the trial court either sustained appellant's objections or provided proper instruction to the jury on each of these issues, and we must presume that the jurors followed the court's instructions. *State v. Roy*, Butler App. No. CA2009-06-168, 2010-Ohio-2540, ¶23; *State v. Loza* (1994), 71 Ohio St.3d 61, 75. Accordingly, we find that appellant has failed to show that the statements were prejudicial or likely to create bias.

{¶16} Appellant argues that the prosecutor acted improperly by repeatedly claiming that the witnesses were disinterested and had no prior contact with the appellant. Having reviewed the record, we find that appellant failed to provide evidence that any of the witnesses who testified at trial had any knowledge of appellant prior to October 2, 2009. Appellant argues that the witnesses were friends of Shane Huff, and yet none of the

witnesses testified to having known Huff longer than eight months. Furthermore, appellant failed to show that any of the witnesses were aware that Huff had ever met appellant. Therefore, we find that these statements by the prosecutor did not result in an unfair trial.

{¶17} Appellant next argues a number of instances of alleged misconduct that occurred during testimony. These include: allowing a witness to vouch for himself, a police officer speculating over hypothetical injuries, not allowing appellant to cross-examine the officer about the lack of injuries to the child, permitting a line of argumentative and irrelevant questions, striking a statement of appellant, allowing the state to object to the credibility of a witness, questioning of a witness's knowledge of the violent history of appellant, and an alleged false impeachment of a witness regarding a conviction for passing bad checks. We have thoroughly reviewed each of these allegations and find that they were either discretionary decisions of the court, or did not prejudicially affect substantial rights of the accused. This court will not deem a trial unfair if, in the context of the entire trial, it appears clear beyond a reasonable doubt that the jury would have found the defendant guilty even without the improper comments. Considering the strength of the case against appellant and the effect of the statements in the context of the entire trial, it appears clear beyond a reasonable doubt that the jury would have found appellant guilty even without the alleged improper comments. Therefore, we find that appellant was not denied a fair trial.

{¶18} Finally, appellant argues that during closing the prosecutor was again permitted to state that all witnesses were disinterested, argue case law to the jury, present inflammatory statements about appellant, and make a "Golden Rule" argument.¹ Prosecutors are given wide latitude in closing argument. *State v. Davis*, 76 Ohio St.3d 107, 119, 1996-Ohio-414. The closing argument must be viewed in its entirety to determine if

1. The "Golden Rule" argument, "exists where counsel appeals to the jury to abandon their position of impartiality by imagining themselves in the position of one of the parties." *Lykins v. Miami Valley Hospital*, 157 Ohio App.3d 291, 2004-Ohio-2732, ¶31.

appellant was prejudiced. *State v. Ballew*, 76 Ohio St.3d 244 at 255, 1996-Ohio-81. In addition, "the golden rule argument is no longer deemed prejudicial per se * * *." *Lykins v. Miami Valley Hosp.*, 157 Ohio App.3d 291, 2004-Ohio-2732, ¶31. After having thoroughly reviewed the prosecutor's entire closing argument, we find that appellant was not prejudiced by the alleged improper comments. We have already determined that the trial court did not act improperly in allowing the prosecutor to state that the witnesses were disinterested. In regards to the other arguments, the jury was instructed by the court as to the proper applicable law, the alleged inflammatory statements were permissible as argument in closing, and the alleged golden-rule argument did not ask the jurors to put themselves in the place of the victim, nor was it prejudicial. Therefore, we find that the alleged misconduct in the closing argument did not result in an unfair trial based on prosecutorial misconduct.

{¶19} We find that appellant was not denied a fair trial based upon any of the comments made by the prosecutor.

{¶20} Accordingly, appellant's second assignment of error is overruled.

{¶21} Assignment of Error No. 3:

{¶22} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN FAILING TO MAKE PROPER RULINGS IN NUMEROUS SPECIFIC AREAS."

{¶23} Appellant argues that the cumulative weight of numerous errors by the trial court had a prejudicial effect, thus denying him a fair trial.

{¶24} Under the cumulative error doctrine, "a conviction will 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*, 74 Ohio St.3d 49, 64, 1995-Ohio-168, citing *State v. DeMarco* (1987), 31 Ohio St.3d 191, paragraph two of the syllabus.

{¶25} Since we have not found multiple instances of harmless error in this case, the

cumulative error doctrine is inapplicable. Accordingly, appellant's third assignment of error is overruled.

{¶26} Judgment affirmed.

POWELL, P.J., and RINGLAND, J., concur.

[Cite as *In re Johnson*, 2011-Ohio-2466.]