[Cite as *State v. Anderson*, 2009-Ohio-6566.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 08AP-1071
v.	:	(C.P.C. No. 07CR06-4563)
Kim L. Anderson,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 15, 2009

Ron O'Brien, Prosecuting Attorney, and *John H. Cousins, IV*, for appellee.

Yeura R. Venters, Public Defender, and *Paul Skendelas*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, P.J.

{¶1} Defendant-appellant, Kim L. Anderson ("appellant"), appeals the judgment of the Franklin County Court of Common Pleas, which convicted him of crimes related to mortgage fraud. For the following reasons, we affirm.

{¶2} In common pleas case No. 07CR06-4563, the Franklin County Grand Jury indicted appellant on one count of engaging in a pattern of corrupt activity, one count of

theft, five counts of forgery, five counts of money laundering, one count of identity fraud, and five counts of securing writings by deception. In common pleas case No. 07CR06-4568, the grand jury indicted appellant on one count each of forgery, identity fraud, and securing writings by deception. Appellant pleaded not guilty, and a jury trial ensued.

{¶3} At trial, plaintiff-appellee, the state of Ohio ("appellee"), established the following. Appellant participated in a mortgage fraud scheme that involved six properties and that defrauded mortgage lenders of over $1 million. Appellant never purported to be a buyer, seller or real estate agent during any of the transactions. Instead, appellant held himself out as a "facilitator" in the transactions. (Vol. X Tr. 1764.) Appellant paid others to portray straw buyers in pre-arranged property transactions. Appellant prepared falsified loan applications for the buyers, and presented falsified documents to mortgage brokers. Some of the buyers used stolen identities. Appellant kept $180,476.55 in proceeds from the mortgages in the five real estate transactions in case No. 07CR06-4563.

{¶4} One buyer, Deborah Steele Bosley, testified that she met defense counsel through appellant. Taisean Glover, appellant's co-defendant, testified that defense counsel represented him on two separate occasions for drunk driving and driving under license suspension. Defense counsel's name appeared in some of the payment records in the real estate transactions because counsel had represented appellant previously. The trial court instructed the jury that the documents were being used only to show that appellant received economic benefit from the real estate transactions. Defense counsel signed documents in a real estate transaction on behalf of a seller after the seller

provided him power of attorney. The court instructed the jury that this evidence was being used only to show that the "documentation was executed." (Vol. III Tr. 298.) Defense counsel agreed to the court providing these instructions; defense counsel indicated that the instructions would resolve any potential problem.

{¶5} Cornelius Mitchell acted as a straw buyer where he used the stolen identity of Jay Koblenz. The prosecution did not include Mitchell on the written witness list it provided the defense in discovery. During voir dire, the prosecution mentioned Mitchell as a possible witness. At opening statement, defense counsel mentioned that someone used Koblenz's stolen identity during one property transaction. Defense counsel argued, "[t]he question is who is this individual and whether [appellant] knew that he was not, in fact, Jay Koblenz." (Vol. III Tr. 294.) Subsequently, the prosecution informed defense counsel that Mitchell would testify. Defense counsel moved for a mistrial on counts related to Mitchell's participation. Defense counsel argued that Mitchell was a "surprise" witness and that he was not "ready to take on this witness." (Vol. IX Tr. 1386-87.) Defense counsel expressed concern about "the spill-over effect" of Mitchell's testimony on non-related counts. (Vol. IX Tr. 1386.)

{¶6} The prosecution conceded that Mitchell was not "on a written witness list." (Vol. IX Tr. 1388.) The prosecution explained that it did not determine Mitchell's identity and role in the mortgage fraud scheme until two or three days before the trial started. The prosecution noted that it mentioned Mitchell as a potential witness during voir dire on September 22, 2008. The prosecution indicated that Mitchell "was not in custody to be interviewed" until Friday, September 26, 2008. (Vol. IX Tr. 1387.) The prosecution

said that on the following Monday, September 29, 2008, it informed defense counsel that Mitchell might testify. The prosecution said, "[w]e still had not determined if we were going to call him until we could speak with him again [on the] morning" of Wednesday, October 1, 2008. (Vol. IX Tr. 1387.) The trial court denied the mistrial motion.

{¶7} Mitchell testified the next day. Before Mitchell testified, defense counsel confirmed that he received Mitchell's video- and audio-taped statements and Mitchell's criminal record. Defense counsel said that he was "[r]eady to go." (Vol. X Tr. 1561.) Mitchell testified that he had known appellant for 44 years and that he worked with appellant in the mortgage fraud scheme as a straw buyer who assumed Koblenz's identity. Mitchell testified that he was indicted on crimes related to the mortgage fraud and separate non-related criminal conduct. Mitchell testified that plea negotiations have yielded no agreements, but "conversations" with the prosecution may resume. (Vol. X Tr. 1584.) On cross-examination, Mitchell admitted to having previous convictions for forgery and theft.

{¶8} During closing argument, defense counsel argued that Mitchell "is the only evidence that was presented that [appellant] knew that Jay Koblenz was not Jay Koblenz." (Vol. X Tr. 1768.) Defense counsel said that the jury needed to decide whether Mitchell truthfully testified. Defense counsel told the jury to be suspicious of Mitchell's testimony because he was charged as an accomplice in the mortgage fraud.

{¶9} The court granted the prosecution's motion to dismiss the securing writings by deception counts in both cases. The jury found appellant guilty of the

remaining counts in case No. 07CR06-4563. The jury was unable to reach a verdict on the remaining counts in case No. 07CR06-4568, and the court dismissed those counts. The court sentenced appellant to concurrent and consecutive prison terms for a total of 15 years imprisonment. At the conclusion of the trial, the court noted that defense counsel "conducted a spirited defense on [appellant's] behalf." (Vol. XII Tr. 43.) Appellant requested that the trial court appoint defense counsel for appeal.

{¶10} Appellant appeals, raising the following assignments of error:

> FIRST ASSIGNMENT OF ERROR
>
> The trial court erred by imposing consecutive sentences without making the required statutory findings pursuant to R.C. 2929.14(E)(4).
>
> SECOND ASSIGNMENT OF ERROR
>
> There was insufficient evidence to support a guilty verdict for the offense of theft as a felony of the first degree as the value of property and services stolen did not exceed one million dollars, as required by R.C. 2913.02(B)(2).
>
> THIRD ASSIGNMENT OF ERROR
>
> The trial court erred in permitting the state to introduce a surprise witness during the course of trial who was not listed in pre-trial discovery and who dramatically undermined Appellant's proffered defense. This denied Appellant due process under the state and federal Constitutions.
>
> FOURTH ASSIGNMENT OF ERROR
>
> The trial court erred, in violation of Ohio's allied offense statute as set forth in R.C. 2941.25, in imposing consecutive terms of incarceration for the offenses of theft and forgery, arising from the same transaction.

FIFTH ASSIGNMENT OF ERROR

> Defense counsel's implication in the charges filed against his client and his involvement with the co-defendant denied Appellant due process and a fair trial as guaranteed under the state and federal Constitutions.

{¶11} In his first assignment of error, appellant argues that the trial court erred by imposing consecutive sentences without making findings pursuant to Ohio's felony sentencing statutes. We disagree.

{¶12} Appellant challenges *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, ¶99, where the Supreme Court of Ohio excised as unconstitutional statutes that obliged trial courts to make certain findings before imposing consecutive sentences. Appellant claims that *Foster* is wrong, pursuant to *Oregon v. Ice* (2009), ___ U.S. ___, 129 S.Ct. 711, and that, despite *Foster*, he was entitled to be sentenced under these excised statutes. In *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, ¶35, the Supreme Court of Ohio declined to address *Ice* because the issue had not been properly presented and briefed, and the court reiterated *Foster's* decision to take "away a judge's duty to make findings before" imposing consecutive sentences. The Supreme Court of Ohio continues to adhere to *Foster*, and we decline to depart from *Foster* until that court directs otherwise. *State v. Crosky*, 10th Dist. No. 09AP-57, 2009-Ohio-4216, ¶6-8. Therefore, we overrule appellant's first assignment of error.

{¶13} In his second assignment of error, appellant argues that his conviction for first-degree felony theft is based on insufficient evidence. We disagree.

{¶14} Sufficiency of the evidence is a legal standard that tests whether the evidence introduced at trial is legally sufficient to support a verdict. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. We examine the evidence in the light most favorable to the state and conclude whether any rational trier of fact could have found that the state proved beyond a reasonable doubt the essential elements of the crime. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus; *State v. Yarbrough,* 95 Ohio St.3d 227, 2002-Ohio-2126, ¶78. We will not disturb the verdict unless we determine that reasonable minds could not arrive at the conclusion reached by the trier of fact. *Jenks* at 273. In determining whether a conviction is based on sufficient evidence, we do not assess whether the evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. See *Jenks,* paragraph two of the syllabus; *Yarbrough* at ¶79 (noting that courts do not evaluate witness credibility when reviewing a sufficiency of the evidence claim).

{¶15} Theft is a first-degree felony if "the value of the property or services stolen is one million dollars or more." R.C. 2913.02(B)(2). Appellant's first-degree felony theft conviction stems from mortgages procured in the five real estate transactions in case No. 07CR06-4563. The mortgages exceeded $1 million. Appellant does not dispute that he can be convicted of theft for the mortgage fraud scheme. See *State v. Wells*, 8th Dist. No. 92130, 2009-Ohio-4712, ¶16-26 (concluding that a defendant was guilty of theft for engaging in a mortgage fraud scheme). See also *State v. Huff*, 8th Dist. No. 92427, 2009-Ohio-5368, ¶36-39 (same). Appellant notes that R.C. 2913.02(A), which defines "theft," states that no person "shall knowingly obtain or exert control over * * *

property or services." Appellant contends that he only obtained and exerted control over $180,476.55 in proceeds from the mortgages in the five real estate transactions. Appellant notes that this amount makes the theft a third-degree felony. See R.C. 2913.02(B)(2). To bolster his argument, appellant distinguishes theft from forgery. Appellant cites *State v. Edwards*, 2d Dist. No. 22648, 2009-Ohio-1408, ¶18-28, and *State v. Musselman*, 2d Dist. No. 22210, 2009-Ohio-424, ¶37, which held that theft and forgery are not allied offenses of similar import because theft, unlike forgery, requires an individual to obtain or exercise control over property.

{¶16} The statute does not define "obtain." Therefore, we will give it its common and ordinary meaning. *Basic Distrib. Corp. v. Ohio Dept. of Taxation*, 94 Ohio St.3d 287, 292, 2002-Ohio-794. "Obtain" means to "get, acquire, or procure, as through an effort or by a request." Webster's Unabridged Dictionary (Random House 2d ed. 2001). In *Lane v. State* (1984), 60 Md.App. 412, 415-26, the court upheld a defendant's theft conviction from his participation in a mortgage fraud scheme that involved the defendant procuring straw buyers and inducing them to provide fraudulent information to a lender. The court concluded that "the jury could fairly infer that [the defendant] used deception" to obtain the mortgages. Id. at 421. The court held that the "value" of the theft was the entire monetary amount of the mortgages acquired and that defendant was culpable for this entire amount. Id. at 425. We agree with the rationale in *Lane*. Utilizing this rationale, and applying the common and ordinary meaning of "obtain," we conclude that the evidence established that appellant engaged in a mortgage fraud scheme to "get,

acquire, or procure," i.e., obtain, the loans exceeding $1 million in case No. 07CR06-4563 and that appellant is culpable for the entire amount of the loans.

{¶17} "Control" is also undefined in the statute. The common and ordinary meaning of "control" is "to exercise restraint or direction over; dominate; command." Webster's Unabridged Dictionary (Random House 2d ed. 2001). Applying the common and ordinary meaning of "control," we conclude that appellant exercised control over the loans exceeding $1 million in case No. 07CR06-4563 by engaging in a mortgage fraud scheme to deceive lenders into relinquishing money for the loans.

{¶18} In the final analysis, appellant did not just obtain and exercise control over the $180,476.55 in proceeds he retained from the mortgages in case No. 07CR06-4563. Appellant engaged in the mortgage fraud scheme to obtain and exercise control over the mortgages in their entirety, and this amount exceeded $1 million. Accordingly, sufficient evidence supports appellant's first-degree felony theft conviction. Therefore, we overrule appellant's second assignment of error.

{¶19} In his third assignment of error, appellant contends that the prosecution contravened Crim.R. 16 discovery rules by calling Mitchell to testify without disclosing him on its witness list. At trial, appellant argued that the discovery violation required the trial court to declare a mistrial on counts related to Mitchell's participation. On appeal, appellant adds that the discovery violation required the trial court to not allow Mitchell to testify.

{¶20} Under Crim.R. 16, at the request of the defendant, the prosecution shall provide a written list of the witnesses it intends to call at trial. See *State v. Finnerty*

(1989), 45 Ohio St.3d 104, 106. The prosecution has a continuing duty to provide this information prior to or during trial. Crim.R. 16(D). A discovery request triggers the duties on an opposing party, and that party is not free to ignore the request to wait for a court order. See *State v. Love* (Nov. 17, 1992), 10th Dist. No. 92AP-689, citing *Lakewood v. Papadelis* (1987), 32 Ohio St.3d 1, 4. The prosecution violated Crim.R. 16 by calling Mitchell to testify without including him on its written witness list.

{¶21} Prosecutorial violations of Crim.R. 16 result in reversible error only when there is a showing that (1) the violation was willful, (2) disclosure of the information prior to trial would have aided the accused's defense, and (3) the accused suffered prejudice. *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, ¶131. Accord *State v. Bruce*, 10th Dist. No. 07AP-355, 2008-Ohio-4370, ¶70. Here, even if appellant could show that the state's violation was willful and that pre-trial disclosure would have aided his defense, we discern no prejudice.

{¶22} During voir dire, the prosecution disclosed Mitchell as a possible witness. And, after Mitchell was placed in custody and interviewed, the prosecution told the defense that Mitchell was a prospective witness.

{¶23} At trial, defense counsel argued that he was inadequately prepared for Mitchell's testimony. Defense counsel did not request a continuance, however. Instead, just before Mitchell testified, defense counsel said that he was ready to proceed after confirming that he received Mitchell's video- and audio-taped statements and his criminal record. In the absence of a request for a continuance, the trial court

could properly conclude that the defense was prepared to go forward at that time. *Finnerty* at 108.

{¶24} On appeal, appellant asserts that production of Mitchell's testimony in the middle of trial crippled his defense because, contrary to Mitchell's testimony, defense counsel argued during opening statement that appellant did not know someone assumed Koblenz's identity. Notably, defense counsel did not specify this concern in the trial court. Defense counsel merely made a vague reference to a "spill-over effect" of Mitchell's testimony. (Vol. IX Tr. 1386.) In any event, appellant's claim lacks merit. Because defense counsel had notice of Mitchell being a potential witness when the prosecution mentioned his name during voir dire, defense counsel had at least an opportunity to inquire about the prosecution's use of the witness and alter his trial strategy to account for the witness. See *Love* (recognizing the need for the defense to take "ameliorative actions that were readily available" after a discovery violation).

{¶25} Moreover, as the trial progressed, defense counsel successfully incorporated Mitchell's testimony into appellant's defense by challenging Mitchell's credibility and highlighting this weakness in the prosecution's case. In particular, defense counsel impeached Mitchell with his prior crimes of theft and forgery. Defense counsel was properly able to impeach Mitchell with these offenses because they were crimes of dishonesty. See *State v. Taliaferro* (1981), 2 Ohio App.3d 405, 406-07. Likewise, defense counsel portrayed Mitchell's testimony as dubious because he was charged as an accomplice to the mortgage fraud.

{¶26} We also need not reverse appellant's convictions for the discovery violation because, apart from Mitchell's testimony, overwhelming evidence established appellant's guilt in the fraudulent Optimara Drive real estate transaction that involved Mitchell. See *Love* (declining to reverse a defendant's conviction for the prosecution's failure to timely disclose evidence, pursuant to Crim.R. 16, because other evidence overwhelmingly established the defendant's guilt). The actual Koblenz testified that someone stole his identity to purchase the Optimara Drive property. Koblenz identified documents that were fraudulently manufactured in his name; these documents were necessary for the Optimara Drive transaction and included loan records and copies of a bank statement, a vendor's license, and a driver's license. Koblenz also described as false a letter for a loan officer that purported to identify an accounting firm he used, and a representative from the accounting firm verified that the firm did not work with Koblenz. The evidence showed that appellant facilitated this Optimara Drive transaction through use of Koblenz's stolen identity. Robert Robinson financed construction on Optimara Drive and testified that appellant presented a buyer referred to as Koblenz. Appellant said that this man was an acquaintance, but Robinson later found out that the buyer was not the real Koblenz. Although appellant acted surprised when Robinson told him that the buyer was not really Koblenz, this reaction was disingenuous because police found, in appellant's home, those documents that the real Koblenz identified as fraudulent.

{¶27} Because appellant cannot satisfy all three *Jackson* prongs, we discern no reversible error from the prosecution's Crim.R. 16 violation. Accordingly, we need not

disturb the trial court's decision to deny appellant's mistrial motion and to allow Mitchell to testify. See *State v. Walters*, 10th Dist. No. 06AP-693, 2007-Ohio-5554, ¶54-55 (concluding that a defendant's requested discovery violation sanction was not warranted because the *Jackson* prongs were not satisfied). Therefore, we overrule appellant's third assignment of error.

{¶28} In his fourth assignment of error, appellant argues that he cannot be separately convicted and sentenced for theft and forgery because R.C. 2941.25 requires that the forgery offenses merge with the theft offense. We disagree.

{¶29} Appellant did not raise this objection in the trial court. Therefore, appellant forfeited all but plain error. See Crim.R. 52(B). Plain error exists when there is error, the error is an obvious defect in the trial proceedings, and the error affects substantial rights. *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68. A court recognizes plain error with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. Id.

{¶30} Ohio's multiple-count statute, R.C. 2941.25, provides:

> (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.
>
> (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.

{¶31} R.C. 2941.25 requires a two-step analysis. *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, ¶14. " 'In the first step, the elements of the two crimes are compared. If the elements of the offenses correspond to such a degree that the commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import and the court must then proceed to the second step. In the second step, the defendant's conduct is reviewed to determine whether the defendant can be convicted of both offenses. If the court finds either that the crimes were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses." ' (Emphasis omitted.) Id., quoting *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117. Under the first step, the elements are compared in the abstract without consideration of the evidence in a particular case. *Cabrales* at ¶22; *State v. Rance*, 85 Ohio St.3d 632, 636, 1999-Ohio-291. The elements of the compared offenses need not align exactly for the offenses to be allied offenses of similar import. *Cabrales* at ¶22. If the offenses are so similar that the commission of one offense will necessarily result in commission of the other, then the offenses are allied offenses of similar import. Id. at ¶26. Allied offenses of similar import committed with a single animus must merge into a single conviction. *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶42. A defendant may be convicted and sentenced on multiple offenses if they are either "(1) offenses of dissimilar import [or] (2) offenses of similar import committed separately or with a separate animus." Id. at ¶17.

{¶32} In *Brown*, the Supreme Court of Ohio said that "[w]hile our two-tiered test for determining whether offenses constitute allied offenses of similar import is helpful * * * it is not necessary to resort to that test when the legislature's intent is clear from the language of the statute." Id. at ¶37. However, in *State v. Harris*, 122 Ohio St.3d 373, 2009-Ohio-3323, ¶7-14, the Supreme Court of Ohio reaffirmed that the two-tier test mentioned in *Rance* and *Cabrales* governs the multiple-offense issue.

{¶33} Appellant argues that forgery and theft are allied offenses of similar import under the first prong of the two-tier test. We analyze the offenses in the abstract under this first prong. See *Cabrales* at ¶22; *Rance* at 636. R.C. 2913.02 defines "theft" and states:

> (A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways:
>
> (1) Without the consent of the owner or person authorized to give consent;
>
> (2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent;
>
> (3) By deception;
>
> (4) By threat;
>
> (5) By intimidation.

{¶34} R.C. 2913.31(A) defines "forgery" and states:

> (A) No person, with purpose to defraud, or knowing that the person is facilitating a fraud, shall do any of the following:
>
> (1) Forge any writing of another without the other person's authority;

> (2) Forge any writing so that it purports to be genuine when it actually is spurious, or to be the act of another who did not authorize that act, or to have been executed at a time or place or with terms different from what in fact was the case, or to be a copy of an original when no such original existed;
>
> (3) Utter, or possess with purpose to utter, any writing that the person knows to have been forged.

{¶35} Appellant notes that, in *State v. Wolfe* (1983), 10 Ohio App.3d 324, 325-26, the Second District Court of Appeals concluded that theft and forgery are allied offenses of similar import. After *Wolfe*, however, the Second District held that theft and forgery are not allied offenses of similar import. See *Edwards* at ¶18-28, and *Musselman* at ¶37. In *State v. Kuhlen* (Nov. 23, 1999), 10th Dist. No. 99AP-107, we rejected *Wolfe* because the court applied a "fact-based analysis" that *Rance* disapproved. We compared theft and forgery in the abstract and concluded that the offenses are not allied offenses of similar import. We noted that "it is clear that the commission of one does not necessarily result in the commission of the other." While "[f]orgery involves the creation of a spurious writing with the purpose to defraud," a theft "involves obtaining or exerting control over property with the purpose of depriving the owner of the property without the owner's consent." Conversely, "[f]orgery does not involve exerting control over property without the consent of the owner" and "theft does not involve a fraudulent writing."

{¶36} Appellant argues that our analysis in *Kuhlen* disregards situations where forgery results in financial gain and control over property. However, a forgery offense is not dependent on the defendant's financial gain and control over property. See *State v.*

Habash (Jan. 31, 1996), 9th Dist. No. 17073 (recognizing that "[d]efendants' forgery convictions were based on their acts of endorsing the food stamps. Their theft convictions, on the other hand, were based on the acts of redeeming the food stamps for cash"). In fact, a forgery offense can result from the defendant not obtaining financial gain and control over property. See *State v. Crittenden* (Mar. 7, 1979), 1st Dist. No. C-780315 (upholding a forgery conviction where a defendant forged a signature on a credit card, but did not complete a sale attempted with the credit card). Further undermining appellant's argument is that, in his second assignment of error, appellant distinguishes theft from forgery by citing *Edwards* and *Musselman* for the contention that theft requires an individual to obtain or exert control over property and forgery does not have this requirement.

{¶37} We conclude that theft and forgery are not allied offenses of similar import. Thus, our analysis under R.C. 2941.25 ends. *Rance* at 636. Appellant's forgery offenses do not merge with the theft offense, and the trial court did not commit error, let alone plain error, by separately convicting and sentencing appellant for forgery and theft. Therefore, we overrule appellant's fourth assignment of error.

{¶38} In his fifth assignment of error, appellant argues that he was denied due process and a fair trial. We disagree.

{¶39} Appellant argues that his defense was tainted in front of the jury because defense counsel (1) received money from some of the real estate transactions that were part of the fraud, (2) had power of attorney to sign documents in a real estate transaction that was part of the fraud, (3) knew witness Bosley, (4) previously

represented witness and co-defendant Glover, and (5) had a longstanding relationship with appellant. Appellant also argues that, due to these factors, (1) defense counsel should not have represented him, and (2) defense counsel violated ethical duties by representing him.

{¶40} Appellant evokes constitutional due process and fair trial protections. According to the United States Supreme Court, no right ranks higher than a defendant's constitutional right to a fair trial. *Press-Ent. Co. v. Superior Court of California, Riverside Cty.* (1984), 464 U.S. 501, 508, 104 S.Ct. 819, 823. A fair trial in a fair tribunal is a basic requirement of due process. *State v. Lane* (1979), 60 Ohio St.2d 112, 114. As appellee recognizes, appellant's claims concerning defense counsel also evoke the constitutional right to effective assistance of counsel. See *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (recognizing that a defendant receives ineffective assistance of counsel in violation of the Sixth Amendment when counsel's performance is outside the range of professionally competent assistance and results in prejudice to the defense).

{¶41} We conclude that appellant was not denied due process and a fair trial and did not receive ineffective assistance of counsel. Because the evidence did not show any criminal involvement by defense counsel, there was no taint to appellant's defense from defense counsel's representation. Moreover, the trial court provided limiting instructions to cure improper inferences, and a jury is presumed to follow instructions that the trial court provides. *State v. Stallings*, 89 Ohio St.3d 280, 286, 2000-Ohio-164. Although appellant contends that defense counsel violated ethical

duties by remaining on the case, appellant points to no specific rule of professional conduct to support this contention. In fact, the record is devoid of evidence that defense counsel compromised his duties as appellant's attorney. Defense counsel's efforts resulted in a hung jury in case No. 07CR06-4568. At the conclusion of the trial, the court complemented defense counsel on providing appellant "a spirited defense." (Vol. XII Tr. 43.) Appellant was pleased enough with defense counsel's performance to originally request his services on appeal. Accordingly, we overrule appellant's fifth assignment of error.

{¶42} In summary, we overrule appellant's five assignments of error. Consequently, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT, J., concurs.
TYACK, J., dissents.

TYACK, J., dissenting.

{¶43} I respectfully dissent.

{¶44} The third assignment of error alleges far more than a violation of Crim.R. 16. The assignment of error alleges that the fairness required for Due Process of Law was undermined when Cornelius Mitchell, a critical witness whose name had not been provided in discovery, was called to the witness stand far into the trial.

{¶45} To clarify the problem, a jury had been selected after extensive voir dire. Defense counsel had set forth his defense in a detailed opening statement. Over 30 witnesses had been called to the witness stand to testify and be cross-examined. Then

and only then did the prosecution notify defense counsel that a new, key witness had been found and would be called to testify. The new witness was a close personal friend of appellant. The witness claimed that he had been asked by appellant to pretend to be someone whose name had been stolen through identity theft to facilitate some of the transactions of mortgage fraud. The witness completely undermined the theory of the defense as to several of the charges and rendered defense counsel's credibility with the jury close to being non-existent.

{¶46} The majority seems to attach some significance to the fact that defense counsel told the court that he was ready to proceed with the trial after counsel made an extensive record about counsel's objections to Cornelius Mitchell being permitted to testify. Counsel had no choice but to proceed. Saying that counsel is ready to proceed does not waive counsel's objections. Instead, the statement only acknowledges that counsel accepts the trial court's ruling, as indeed counsel must.

{¶47} Asking for a continuance was of no use. Defense counsel knew what Mitchell was going to say, so interviewing Mitchell was of no use. Spending the court and jury's time on a delay which accomplished nothing borders on the unethical.

{¶48} Criminal trials are not meant to be games with winners and losers. Criminal trials are meant to be fair proceedings at which triers of fact adjudicate the guilt or innocence of the accused. The guilty are entitled to fair trials just as much as persons who are innocent.

{¶49} I can understand the reticence of a trial judge to declare a mistrial after several days of proceedings and after the testimony of over 30 witnesses. The

pressure on trial court judges in major metropolitan areas to keep their docket moving is enormous. However, a current docket should not be achieved at the cost of sanctioning unfair trials. Kim Anderson's trial went from fair to unfair when the State of Ohio was permitted to call Cornelius Mitchell to the witness stand.

{¶50} Due Process of Law is intricately linked with fundamental fairness. Kim Anderson's trial was not fair. He was deprived of Due Process of Law as a result.

{¶51} I would sustain the third assignment of error, vacate the conviction and send this case back for a new trial or appropriate plea proceedings. Since the majority does not do so, I respectfully dissent.