**[Cite as *State v. White*, 2011-Ohio-2364.]**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

| | | |
|---|---|---|
| State of Ohio, | : | |
| Plaintiff-Appellee, | : | |
| | | No. 10AP-34 |
| v. | : | (C.P.C. No. 09CR01-406) |
| Chaz R. White, | : | (REGULAR CALENDAR) |
| Defendant-Appellant. | : | |

D E C I S I O N

Rendered on May 17, 2011

*Ron O'Brien*, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

*Keith O'Korn*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

HENDRICKSON, J.

**{¶1}** Defendant-appellant, Chaz R. White, appeals from his conviction and sentence in the Franklin County Court of Common Pleas for attempted murder, aggravated robbery, felonious assault, theft, and robbery.

**{¶2}** At trial, the prosecution alleged that appellant shot the victim, Christopher Butler, at an apartment complex in Columbus on the evening of January 13, 2009. According to the prosecution, appellant and Butler were once friends. On the night in question, appellant and Butler drove around in search of an open area purportedly for

Butler to test-fire appellant's handgun. Upon arrival at an apartment complex near the intersection of Morse and Westerville Roads, appellant shot Butler twice. Afterward, the prosecution asserted, appellant took the victim's wallet and car keys and fled the scene in the victim's car. Butler's injuries left him permanently paralyzed from the chest down.

**{¶3}** Appellant was tried by jury and convicted of the aforementioned offenses. Thereafter, the trial court imposed an aggregate prison sentence of 27 1/2 years. The sentence included ten-year terms for the attempted murder and aggravated robbery counts, a three-year term for each of the firearm specifications accompanying these two counts, and an 18-month term for the theft conviction, all to be served consecutively. Additional prison terms on the robbery and felonious assault convictions were imposed concurrent with the above terms.

**{¶4}** Appellant brings the following eight assignments of error on appeal:

> [1.] THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO SUPPRESS THEREBY VIOLATING CRIM.R. 12(D) AND HIS RIGHTS UNDER THE 5TH AMENDMENT OF THE U.S. CONSTITUTION AND ARTICLE I, SECTION 14 OF THE OHIO CONSTITUTION.
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> [2.] THE COURT ABUSED ITS DISCRETION AND DENIED APPELLANT A FAIR TRIAL WHEN IT FAILED TO DISMISS ONE JUROR WHO DEFIED THE COURT'S ORDER BUT DISMISSED ANOTHER JUROR LATE FOR A JURY VIEW.
>
> [3.] THE STATE'S LATE DISCLOSURE OF THE MISC. REPORT VIOLATED APPELLANT'S DUE PROCESS RIGHTS, THE UNDERPINNINGS OF *BRADY V. MARYLAND* AND CRIMINAL RULE 16, AND THE COURT ABUSED ITS DISCRETION WHEN IT DENIED APPELLANT'S DISMISSAL MOTION.
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> [4.] APPELLANT'S CONVICTIONS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

> [5.] THE TRIAL COURT ERRED IN SENTENCING THE APPELLANT ON FELONIOUS ASSAULT, ROBBERY, AND THEFT COUNTS IN VIOLATION OF THE DOUBLE JEOPARDY CLAUSE OF THE 5TH AMENDMENT OF THE U.S. CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION.
>
> [6.] THE TRIAL COURT ERRED IN SENTENCING THE APPELLANT ON AGGRAVATED ROBBERY AND ATTEMPTED MURDER COUNTS AND MULTIPLE GUN SPECIFICATIONS IN VIOLATION OF THE DOUBLE JEOPARDY CLAUSE OF THE 5TH AMENDMENT OF THE U.S. CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUITON.
>
> [7.] THE CONSECUTIVE, MAXIMUM SENTENCES AND THE RESTITUTION IMPOSED WERE CONTRARY TO LAW AND VIOLATED THE 6TH AMENDMENT TO THE U.S. CONSTITUTION.
>
> [8.] TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE 6TH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 10 & 16 OF THE OHIO CONSTITUTION.

**{¶5}** Appellant's first assignment of error asserts that the trial court erred in denying his motion to suppress certain statements made to law enforcement officials both at the time of his apprehension and later at the police station. For purposes of discussion, we shall consider these declarations as three distinct statements distinguished by chronology and context.

**{¶6}** Officer Michael Muscarello of the Columbus Division of Police testified that he proceeded to appellant's residence based on information provided by the victim. When the officer arrived, he observed appellant and his grandmother seated in the grandmother's car in front of appellant's home. Appellant's grandmother drove him to his residence after picking him up near the intersection of State Route 161 and Cleveland Avenue in Columbus. Officer Muscarello boxed the vehicle in with his cruiser. The officer

arrested appellant, whereupon he immediately placed appellant in handcuffs, patted him down, and placed him in the cruiser. It was at this time that appellant allegedly made his first statement describing his activity on the night in question. As will be seen, this statement would conflict with subsequent statements to police.

**{¶7}** As recounted by Officer Muscarello, appellant declared that he and Butler travelled to apartments off of Westerville Road or Morse Road to meet an unknown individual, and that Butler and this individual briefly spoke. Appellant then heard gunshots. In this account, appellant became frightened and fled through a wooded area towards Morse Road, where he later called his grandmother to pick him up. After fleeing the area, appellant repeatedly but unsuccessfully called Butler to ascertain whether Butler was safe. Appellant also asked Officer Muscarello what had happened to Butler.

**{¶8}** The second and third statements at issue were presented in court in part by video replay and corroborated by the testimony of Detective Brian Boesch of the Columbus Division of Police. Detective Boesch interviewed appellant at the police station after appellant's arrest. In his second statement, appellant claimed that he and Butler were drug dealers and that he accompanied Butler to the Charlotte Drive apartment to conduct a drug deal with a prior client of Butler's called Nemo or Emo. When the two men arrived at the apartment complex, Butler asked appellant to hide by a dumpster at the end of the street. This ostensibly afforded them the advantage of surprise in case the other party to the deal caused trouble.

**{¶9}** Next, according to appellant, three men pulled up in a white Blazer and walked towards Butler. Appellant then heard gunshots and heard Butler yelling, "go, go, go." (Tr. 462.) Butler returned fire. Appellant then fled, believing that Butler also ran

from the scene but in a different direction. As he fled through the woods, appellant became covered in burrs. Again, appellant described trying to call Butler repeatedly without answer.

**{¶10}** In this second statement, appellant claimed that he called Butler's girlfriend to pick him up after fleeing. She allegedly drove appellant from Morse Road to State Route 161, where appellant's grandmother picked him up and drove him home. While departing the area in his grandmother's car, appellant maintains that he saw another person driving Butler's car on State Route 161.

**{¶11}** At this point in the interview, Detective Boesch directed appellant's attention to difficulties with his alleged version of events. For example, the interior of Butler's car, which police had recovered, contained clusters of burrs similar to those appellant admitted to picking up in his flight through the woods. Detective Boesch also noted that police recovered Butler's car within 100 yards of the location in which appellant was picked up by his grandmother.

**{¶12}** Detective Boesch subsequently interrupted the interview with appellant and spoke to Butler's father, Michael Butler. Michael informed the detective that the victim's girlfriend did not drive. Detective Boesch went to the girlfriend's home to confirm this detail. He then returned to police headquarters and recommenced the interview with appellant.

**{¶13}** The next phase of the interview was not video recorded, but was presented solely through Detective Boesch's testimony at trial. It was at this time that appellant proposed his third version of events. Appellant conceded that he had not, in fact, phoned Butler's girlfriend for a ride. Rather, he immediately jumped in Butler's car and left the

scene of the shooting. He allegedly abandoned Butler's car at a business on Morse Road and fled on foot for a time before regaining the vehicle and abandoning it at another location. In this final version, appellant claimed that he never actually saw the shooting. According to appellant, he did not drive Butler's car back to the scene of the shooting for fear that he would be charged with theft of the vehicle.

**{¶14}** Regarding the first statement at issue, appellant asserts that he was in custody when he made his initial remarks to police and that the police had not properly advised him of his rights under *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602. Regarding the second and third statements at issue, appellant asserts that he specifically requested counsel during the initial phase of questioning at the police station and that questioning continued despite his request. Moreover, appellant contends that the waiver of rights he signed at that time was tainted by the circumstances under which it was executed.

**{¶15}** In response, the state maintains that appellant's motion to suppress was not timely filed under Crim.R. 12(D). Alternatively, the state disputes appellant's contention that he was in custody at the time he made his first statement to police. The state further argues that *Miranda* warnings were not required at that time because appellant voluntarily offered this statement rather than making it in response to police questioning. Regarding appellant's second and third statements made during the interview at police headquarters, the state asserts that appellant never unequivocally requested counsel prior to making these statements. Procedurally, the state also emphasizes that appellant failed to request suppression of any statements other than his first statement to police at the scene of his arrest.

**{¶16}** The trial court denied appellant's motion to suppress solely on the basis that it was untimely. Pursuant to Crim.R. 12(D), motions to suppress must be filed within 35 days of a defendant's arraignment or seven days before trial, whichever is earlier. The failure of a defendant to move for suppression of illegally obtained evidence within this timeframe results in a waiver of any error regarding the acquisition of the evidence. *State v. Wade* (1978), 53 Ohio St.2d 182, paragraph three of the syllabus. A trial court's decision denying an untimely motion to suppress will not be disturbed absent an abuse of discretion. *State v. Karns* (1992), 80 Ohio App.3d 199, 202; *Columbus v. Koczka*, 10th Dist. No. 02AP-953, 2003-Ohio-1660, ¶9.

**{¶17}** A review of the procedural posture supports the trial court's determination that appellant's suppression motion was untimely. Appellant was indicted on January 22, 2009. Defense counsel entered an appearance the following day. Appellant was arraigned on January 26, 2009. He did not file his motion to suppress until June 2009, nearly five months after his arraignment. Given this timeline, the trial court did not err in ruling that the motion to suppress was untimely. Both the written and oral motions did not fall within the timeframe for filing a suppression motion as enunciated by Crim.R. 12(D). *Koczka* at ¶9.

**{¶18}** Appellant's written motion to suppress did not specify which statements he sought to suppress. At the commencement of trial on November 16, 2009, defense counsel orally moved to suppress appellant's first statement to police at the scene of the arrest. Assuming, arguendo, that the trial court erred in declining to suppress appellant's first statement on the basis that the motion was untimely, we nonetheless find that appellant presented no tenable basis for the exclusion of this statement.

**{¶19}** Appellant insists that he was undeniably in custody when he made his first statement to police while handcuffed in Officer Muscarello's police cruiser. Although the state disagrees, we will assume for purposes of discussion that appellant was in fact in custody when the officer boxed in the grandmother's vehicle, placed appellant in handcuffs, and put him in the back of the cruiser. Appellant, however, does not address the state's argument that he made this statement voluntarily rather than in response to questioning by the officer. Freely volunteered statements do not invoke the same level of scrutiny as those produced under police questioning.

**{¶20}** "[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial *interrogation* of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda*, 384 U.S. at 444, 86 S.Ct. at 1612. (Emphasis added.) "*Prior to any questioning*, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." Id. (Emphasis added.) *Miranda* warnings, therefore, are required only when a defendant is subjected to custodial interrogation, which is defined as express questioning or its functional equivalent. *Rhode Island v. Innis* (1980), 446 U.S. 291, 300-01, 100 S.Ct. 1682, 1689-690; *State v. Dennis*, 10th Dist. No. 05AP-364, 2006-Ohio-2046, ¶19.

**{¶21}** Appellant does not point to evidence in the record that counters Officer Muscarello's testimony establishing that appellant freely volunteered his first statement without questioning or prompting by the officer. The trial court, therefore, would not have abused its discretion in admitting this statement even had the court considered *Miranda*

issues rather than denying the motion to suppress on the basis that it was untimely. For the foregoing reasons, the trial court did not err in declining to suppress appellant's first statement to police.

**{¶22}** Because appellant neither moved to suppress his second and third statements made at police headquarters nor objected to their admission at trial, his arguments on appeal concerning these statements shall be examined under a plain error standard. "It is a general rule that an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court." *State v. Glaros* (1960), 170 Ohio St. 471, paragraph one of the syllabus. "Constitutional rights may be lost as finally as any others by a failure to assert them at the proper time." *State v. Childs* (1968), 14 Ohio St.2d 56, 62, citing *State v. Davis* (1964), 1 Ohio St.2d 28, 30.

**{¶23}** Under Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Plain error exists where there is an obvious deviation from a legal rule which affected the outcome of the proceeding. *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68. Notice of plain error is taken with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *State v. Landrum* (1990), 53 Ohio St.3d 107, 111.

**{¶24}** Due to the absence of any objection, appellant must establish plain error in order to mandate reversal based upon the admission of his second and third statements to police. Appellant asserts that he requested counsel shortly before executing a written

waiver of rights at the outset of questioning at the police station. Under *Edwards v. Arizona* (1981), 451 U.S. 477, 484, 101 S.Ct. 1880, 1885, appellant maintains that this request terminated the effect of prior verbal *Miranda* warnings administered by the police and nullified his subsequent written waiver of rights.

**{¶25}** The circumstances surrounding the interview at police headquarters on the night of the incident were presented at trial through the testimony of Detective Boesch and by way of a redacted version of the videotaped interrogation. This evidence was consistent. Detective Boesch asked the usual preliminary questions to establish that appellant had the capacity to understand the waiver of rights. Appellant stated that he was one credit short of graduation from high school, could read and write, had no hearing disability, had never been diagnosed with a mental illness, and had not consumed drugs or alcohol in the preceding 24 hours. After a verbal exchange that will be reproduced and discussed below, appellant executed the written waiver and proceeded to answer the detective's questions.

**{¶26}** Appellant now argues that the following conversation demonstrates an unequivocal invocation of his right to counsel, that the ensuing signature on the written waiver was ineffective, and that all questioning should have ceased before the allegedly suppressible second and third statements were elicited:

> DETECTIVE BOESCH: * * * I'm going to read these to you. Feel free to question if you misunderstood your rights.
>
> You have the right to remain silent. Anything you say can be used against you in court.
>
> You have the right to talk to a lawyer for advice before we ask you any questions and have him or her present with you during questioning.

If you're unable to pay a lawyer, a lawyer will be appointed for you prior to any questioning if you so desire.

If you wish to answer questions now without a lawyer present, you have the right to stop answering at any time.

You also have the right to stop answering at any time until you talk to a lawyer.

Do you understand what those mean?

MR. WHITE: I have a question.

DETECTIVE BOESCH: Certainly.

MR. WHITE: If I don't -- I'm going to answer your questions, but I just have a question.

DETECTIVE BOESCH: Um-hmm.

MR. WHITE: If I don't answer the questions, I'll be like in jail until my lawyer gets here or something?

DETECTIVE BOESCH: Not necessarily. I haven't --

MR. WHITE: Am I going to jail?

DETECTIVE BOESCH. I don't know. I haven't made that determination yet. This is still -- we're still in the infancy of this investigation. Okay? So I can't tell you one way or another whether or not you're going to jail. Okay?

I will tell you that whether or not you answer my questions has nothing -- has no bearing on whether or not you're going to jail. Okay?

MR. WHITE: I'm just going to answer them anyway because I want to cooperate.

DETECTIVE BOESCH: Okay.

MR. WHITE: I also want to find out what's wrong with my friend.

DETECTIVE BOESCH: Okay. But you understand your rights?

MR. WHITE: Yes.

DETECTIVE BOESCH: Do you have any questions about them?

Okay. Do me a favor, if you would, Chaz. Just read this paragraph back to me.

Do you know what a waiver is?

MR. WHITE: Yes.

DETECTIVE BOESCH: Okay. That's what this is. I just want you to read it back to me out loud so I understand -- or know that you understand what it means.

MR. WHITE: Okay. "I have read and been read the statement of my rights as written above. I understand what my rights are. I do not want a lawyer at -- I do not want a lawyer at this time. I am willing to answer questions. I understand and know what I am doing. No promises or threats have been made to me or pressure of any kind has been used against me."

DETECTIVE BOESCH: Is it a pretty fair statement?

MR. WHITE: Um, yeah.

DETECTIVE BOESCH: It's kind of a three-part statement. The first part says you've read and been read your statement, the rights as written above, and you understand what those are.

That's this here. That's what we just went over, and you said you understand it.

MR. WHITE: Right.

DETECTIVE BOESCH: All right? The second part says you don't want an attorney and you're willing to answer questions. Okay?

MR. WHITE: I have a question.

DETECTIVE BOESCH: Oh, sure.

MR. WHITE: I want to go see my son tonight.

DETECTIVE BOESCH: Okay.

MR. WHITE: So I mean, if I -- if I call for my attorney to come, what would happen, I mean?

DETECTIVE BOESCH: Well, your attorney is not going to come out at 2:30 in the morning. Okay?

So at that point I'll have to make a determination whether or not you go to jail or whether or not we continue the investigation and let you go.

I don't know what that's going to be right now. Okay?

MR. WHITE: Like I said, I do want to cooperate with you no matter what. I do want to cooperate.

DETECTIVE BOESCH: Okay. Up here in your rights it says, "If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time."

MR. WHITE: Okay.

DETECTIVE BOESCH: So at any time when we're answering questions, if you say -- it doesn't have to be for the entire interview. If can just be one certain question. You know, I don't want to answer that question.

MR. WHITE: Okay.

DETECTIVE BOESCH: And we'll move on. Okay?

So getting back to the waiver, the second part of it says you don't want a lawyer and you're willing to answer questions, okay, having the knowledge that you can stop answering at any time.

Okay. And then the last part says you understand and know what you're doing and no promises or threats have been made to you and no pressure of any kind has been used against you.

> I'm not saying if you don't answer questions you're going to jail; I got 40 bucks in it for you if you do answer questions; I'm going to pull a (unintelligible) on you, smack you around if you don't, nothing like that.
>
> Your decision is totally your free will. Okay?
>
> You understand all that? You still want to answer questions now?
>
> MR. WHITE: I mean, I do; but, I mean, I want to see my son.
>
> DETECTIVE BOESCH: Okay. I understand that.
>
> MR. WHITE: I really do. But I mean, I have nothing to hide.
>
> DETECTIVE BOESCH: Okay.
>
> MR. WHITE: Nothing at all, and I do want to cooperate, and I'm going to stick to my word.
>
> DETECTIVE BOESCH: Okay. So you want to answer questions now?
>
> MR. WHITE: Yeah.
>
> DETECTIVE BOESCH: Okay. If you would, just sign right here for me. It's not a signature of guilt or anything like that. You just sign that you agree with the waiver and you're willing to answer questions now.

(Tr. 451-56.)

**{¶27}** "A request for counsel must be clear and unequivocal." *State v. Tolliver*, 10th Dist. No. 02AP-811, 2004-Ohio-1603, ¶78, citing *Davis v. United States* (1994), 512 U.S. 452, 459, 114 S.Ct. 2350, 2355. "If an accused makes a statement concerning the right to counsel 'that is ambiguous or equivocal' or makes no statement, the police are not required to end the interrogation or ask questions to clarify whether the accused wants to invoke his or her Miranda rights." *Berghuis v. Thompkins* (2010), ___ U.S. ___, 130 S.Ct. 2250, 2259-60 (citing *Davis* at 459). Whether a suspect invoked his or her right to

counsel is a question that must be examined "not in isolation but in context." *State v. Murphy*, 91 Ohio St.3d 516, 520-21, 2001-Ohio-112.

**{¶28}** Here, appellant repeatedly expressed his desire to cooperate and proceed with the interview. Appellant's references to counsel do not, in view of his other comments, rise to the level of even a tentative request to consult with counsel. See *State v. Wellman*, 10th Dist. No. 05AP-386, 2006-Ohio-3808. Taken in context, appellant was only inquiring into which course of action, in Detective Boesch's opinion, would be best to secure his release that night so he could visit his son. Detective Boesch responded that appellant's attorney was unlikely to be available at that hour, and that a furtherance of the investigation would determine whether appellant would be released from custody. It is clear that appellant made the conscious and informed decision to continue with the interrogation without the presence of counsel, with the goals of learning about the position of the police with respect to the incident and possibly securing his own release. Appellant neither clearly nor unequivocally invoked his right to counsel. *Davis* at 459. Consequently, we find no error, let alone plain error, in the admission of appellant's second and third statements made during the interview at the police station. *Barnes* at 27.

**{¶29}** We conclude that the trial court did not err in overruling appellant's motion to suppress and in allowing admission of his various statements to police. Appellant's first assignment of error is overruled.

**{¶30}** Appellant's second assignment of error asserts that the trial court erred when it refused to remove a juror who had posted a comment on her Facebook page acknowledging that she had been selected for jury service. Appellant further avers that

the trial court erred when it removed a juror who failed to appear on time on the morning following an overnight recess of the trial.

**{¶31}** A trial court's decision to remove or retain a juror is reviewed under an abuse of discretion standard. *State v. Owens* (1996), 112 Ohio App.3d 334, 336. An abuse of discretion connotes more than a mere error of law or judgment; it implies that a decision was arbitrary, unconscionable, or unreasonable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

**{¶32}** The court in the present case explicitly warned the jury not to utilize any social or communication media to send messages or give information relating to the trial. After it was discovered that one juror noted on her Facebook page that she had been selected to serve on an unspecified case, the court chose not to discharge her but repeated its admonition to the entire jury. Examining the nature and content of the statement posted by the juror, the court concluded that the comment did not constitute an actual violation of preliminary instructions because it did not identify the case or release information about it. Nonetheless, the court deemed the comment undesirable because it could invite more specific and revealing comments from other jurors that would, in fact, constitute a violation of those instructions.

**{¶33}** After reviewing the factors considered by the trial court, we find that the court acted reasonably when it concluded that replacing this juror was unnecessary under the circumstances. Appellant does not articulate any grounds for finding prejudicial error as a result of the trial court's failure to dismiss this juror. Nor does appellant express any basis to support that the trial court abused its discretion in retaining this juror.

**{¶34}** As stated, the trial court dismissed a juror who appeared late on the morning the jury was scheduled for a view of the crime scene. The departure was scheduled for 9:30 a.m., the jury actually departed for the jury view at 9:40 a.m., and the absent juror appeared at 10:50 a.m. Given the demands of a criminal trial schedule and the logistic issues involved with this particular day of proceedings, it was reasonable for the trial court to dismiss the juror and replace him with an alternate. Under either R.C. 2945.29 or Crim.R. 24(G)(1), the trial court could reasonably conclude that the late juror was "unable" to perform his duties. It was not an abuse of discretion for the trial court to dismiss this juror.

**{¶35}** We conclude that the trial court did not err in handling these jury issues. Appellant's second assignment of error is overruled.

**{¶36}** Appellant's third assignment of error asserts that the trial court erred in denying his motion to dismiss the case based upon the state's failure to provide timely and full discovery. Suppression by the prosecution of evidence that is favorable to the accused and is material to guilt or punishment constitutes a violation of due process. *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, ¶27 (quoting *Brady v. Maryland* (1963), 373 U.S. 83, 87, 83 S.Ct. 1194, 1197). "Evidence suppressed by the prosecution is 'material' within the meaning of *Brady* only if there exists a 'reasonable probability' that the result of the trial would have been different had the evidence been disclosed to the defense." Id.

**{¶37}** The document which appellant alleges should have been provided by the state in discovery is the fourth page of a police report pertaining to Butler, the victim in the case at bar. The report relayed an incident in which a person named Edgar Downs

complained that, approximately one month before the shooting, Butler misappropriated Downs' prescription for Oxycontin pain pills. Although police took a report in the matter, no charges were ever filed against Butler.

**{¶38}** It appears that the prosecution came into possession of a more complete copy of this police report, including the contested fourth page, on the first day of trial in the present matter. At that point, the trial court had already ruled that an incomplete version of the report and related testimony were irrelevant and therefore inadmissible. The prosecution did not provide the fourth page of the report to the defense until three days later. The defense then moved to dismiss the case based upon delayed disclosure and a resulting *Brady* violation. The court denied the motion, but allowed the defense to recall Butler as a witness and to present the testimony of the police officers who had taken the report.

**{¶39}** Crim.R. 16(B)(1)(f) parallels the due process principles expressed in *Brady* and provides that the state must disclose evidence known to the prosecution if the evidence is favorable and material to the defendant's guilt or punishment. For failure to comply, Crim.R. 16(E)(3) provides that the trial court "may order such party to permit the discovery or inspection, grant a continuance, or prohibit a party from introducing in evidence the material not disclosed, or it may make such order as it deems just under the circumstances."

**{¶40}** Accordingly, the trial court has discretion under the rules of criminal procedure in determining the appropriate response to discovery issues in criminal cases. *State v. Wiles* (1991), 59 Ohio St.3d 71, 78. Under the Crim.R. 16(B) standard, we find that the trial court's response in the present case was suitably tailored to the impact of the

allegedly suppressed material and to the circumstances under which the delay in furnishing the material to defense counsel occurred.

**{¶41}** We further find that there was no violation of either the letter or the spirit of the law expressed by *Brady* in this case. The evidence here was disclosed to the defense during the trial, rather than after the trial as in *Brady*. In such cases, the due process principles espoused in *Brady* are not violated if the timing of the disclosure of potentially exculpatory evidence does not significantly impair "the fairness of the trial" and the evidence is disclosed " 'in time for its effective use at trial.' " *State v. Iacona*, 93 Ohio St.3d 83, 100, 2001-Ohio-1292 (quoting *United States v. Smith Grading & Paving, Inc.*, (C.A.4, 1985), 760 F.2d 527, 532). See also *State v. Banks*, 10th Dist. No. 01AP-1179, 2002-Ohio-3341; *State v. Payne*, 10th Dist. No. 09AP-107, 2010-Ohio-1018.

**{¶42}** Assuming, arguendo, that the evidence had some exculpatory value, its late disclosure does not rise to the level of materiality set forth under *Brady*. That is, there was no reasonable probability that the result of the trial would have been different had the evidence been disclosed without delay. Because the trial court tailored a suitable evidentiary solution to allow additional testimony along with the admission of the contested material, appellant suffered little prejudice from the belated disclosure of this single page of a miscellaneous police report.

**{¶43}** We conclude that the facts of this case do not indicate a violation of *Brady* and that the trial court did not err in denying appellant's motion to dismiss. Appellant's third assignment of error is overruled.

**{¶44}** Appellant's fourth assignment of error asserts that the verdicts against him were against the manifest weight of the evidence presented at trial. The Supreme Court of Ohio set forth the manifest weight standard as follows:

> "Weight of the evidence concerns 'the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other.' It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief."

*State v. Thompkins*, 78 Ohio St. 3d 380, 388, 1997-Ohio-52, quoting Black's Law Dictionary (6 Ed. 1990) 1594.

**{¶45}** When a court of appeals reverses the judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a "thirteenth juror" and disagrees with the factfinder's resolution of conflicting testimony. Id. at 387. An appellate court should reverse a conviction as against the manifest weight of the evidence in only the most "exceptional cases in which the evidence weighs heavily against conviction," or where the jury "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. Martin* (1983), 20 Ohio App. 3d 172, 175.

**{¶46}** Appellant argues on appeal that Butler's testimony simply was not credible. He further maintains that there are evidentiary problems in the case, including the chain of custody of certain physical evidence and the failure to identify fingerprints on the victim's car and on cartridge casings found at the scene.

**{¶47}** Appellant challenges Butler's testimony in multiple respects, asserting that internal inconsistencies and facial improbabilities in the testimony render the evidence unworthy of any credibility in the eyes of a reasonable jury.

**{¶48}** Butler testified that he and appellant had been friends for several years, often drinking and partying together, and that appellant's grandmother lived near Butler on the north side of Columbus. The day before the shooting, appellant showed Butler a small black handgun and bragged about it.

**{¶49}** According to Butler, appellant came to Butler's home to socialize on the night of the shooting. Sometime after 9:00 p.m., the two men left the residence to take a drive. When Butler expressed interest in the gun, appellant suggested that they go to a secluded area and shoot it.

**{¶50}** Butler testified that he and appellant parked near an apartment building and walked towards a field, at which time Butler heard a loud gunshot behind him and felt a bullet hit him from behind and spin him around. As Butler fell to the ground, now facing appellant, he clearly saw appellant shooting directly at him. Appellant then ran up to Butler as he lay on the ground, yanked on Butler's wallet chain, reached into Butler's pocket, and fled the scene in Butler's car.

**{¶51}** In an attempt to discredit Butler's testimony, appellant argues that the circumstances of the shooting are inconsistent with the duo's desire to test-fire a handgun in an isolated area. The shooting took place in the vicinity of an apartment building, hardly an isolated area. Appellant also asserts that Butler's history of drug involvement, including his alleged misappropriation of Downs' Oxycontin prescription and the discovery of a small bag of marijuana in Butler's car after the shooting, signify that Butler was an

active drug dealer who intended to consummate a potentially violent drug deal on the night in question. Appellant insists that this portrayal of Butler, reflected in appellant's own statements to police regarding the shooting incident, contradicts Butler's depiction of himself as a victim who innocently accompanied a friend to test-fire a handgun.

**{¶52}** All of these aspects of Butler's testimony were effectively brought to the jury's attention at trial by defense counsel. The jurors, as triers of fact, were free to allocate whatever weight they believed this testimony merited. From the verdict, it is clear that the jury found the essential aspects of Butler's testimony to be credible. It is not our role to disturb the jury's assessment of credibility of witnesses unless no reasonable jury could have measured credibility in such a manner or the evidence otherwise weighs heavily against conviction. This is not such a case, and we decline to disturb the jury's assessment of Butler's credibility.

**{¶53}** In addition to Butler's description of the events on the night in question, the state relied upon appellant's inconsistent statements made to police on the night of his arrest. These statements conflicted in many respects, as outlined under our discussion of appellant's first assignment of error. Because we have determined that appellant's statements to police were indeed admissible, the jury was free to consider them in assessing the likelihood of alternative scenarios behind the attempted murder as proposed by the defense.

**{¶54}** In addition to the above testimony and appellant's conflicting statements, the prosecution presented further credible evidence which supported appellant's guilt. For example, the results of a gunshot residue test revealed the presence of residue on the cuffs of the jacket worn by appellant on the night in question. In addition, Butler's

former girlfriend presented testimony to contradict appellant's claim that he called her and she gave him a ride on the night of the incident. According to her testimony, Butler's former girlfriend did not see appellant or Butler that day. Moreover, she did not have a car or a valid Ohio driver's license.

**{¶55}** Police testimony established that Butler's car was discovered late on the night in question with the lights on and the engine running in a parking lot on State Route 161. The location of the car was not far from the place where appellant stated his grandmother ultimately picked him up. There were seed burrs in the car, consistent with at least one of appellant's statements to police in which he described abandoning the vehicle to flee into the woods, only to return to it and drive further away. Police testimony established that, at the time of appellant's apprehension, he had burrs on his clothing. All of this circumstantial evidence could be considered by the jury in reaching its verdict.

**{¶56}** With respect to appellant's arguments challenging police handling of physical evidence following the shooting, appellant first asserts that the placement of a blanket on Butler by bystanders after the shooting may have disturbed evidence or transferred evidence deposited by the "actual assailant." Appellant also points to the fact that the police failed to conduct a gunshot residue test on his hands prior to washing them for fingerprinting after his arrest. Appellant further maintains that the gunshot residue test performed on his coat was flawed because the police failed to establish a chain of custody that would preclude contamination in the period prior to testing. Finally, appellant complains that the police did not fingerprint an unfired bullet recovered at the scene, nor did they seek to identify three different sets of fingerprints lifted from Butler's car.

**{¶57}** The majority of these supposed evidentiary deficiencies actually reflect appellant's dissatisfaction with the manner in which the police conducted the investigation in developing the prosecution's case, not with the weight and credibility of the evidence actually presented at trial. To challenge the weight and credibility of the evidence actually heard by the jury, appellant cannot solely rely upon evidence that was never presented to create a negative inference that such evidence would have inevitably forestalled the ultimate verdict. In evaluating the weight of the evidence in this case, we are far more concerned with assessing the character of the evidence in the record than any evidence that, for whatever reason, was never developed by the police, the prosecution, or the defense. We find that, under the facts of this case, any absent evidence bears little on whether the jury lost its way or improperly weighed the evidence in the record.

**{¶58}** The possible contamination of appellant's jacket prior to gunshot residue testing is the only argument which requires closer scrutiny in appellant's manifest weight challenge. Max Larijani, a forensic scientist assigned to the trace unit of the Ohio Bureau of Criminal Investigation ("BCI"), testified regarding his performance of the test. Larijani stated that he received the item for testing packaged in the usual, appropriate manner designed to protect it from contamination. Appellant does not specify exactly how the chain of custody failed or how possible contamination of the jacket may have occurred. Rather, he generally contends that police investigative handling of the jacket was defective. In the absence of a particular challenge to the reliability of the test, the jury had only Larijani's testimony regarding the propriety and reliability of the residue tests. The jury was free to give credence to this testimony.

**{¶59}** We conclude that the evidentiary issues raised in support of appellant's fourth assignment of error lack merit. Based upon a review of the entire record, particularly Butler's testimony, we find that the evidence presented at trial supports the jury's verdict. Appellant's fourth assignment of error is accordingly overruled.

**{¶60}** Appellant's fifth assignment of error asserts that the trial court erred in sentencing appellant on various counts that should have been merged as allied offenses of similar import. First, appellant argues that the court improperly failed to merge the allied offenses of felonious assault and attempted murder. Appellant argues that these unmerged convictions lead to multiple punishments for the same offense, and thus violate the Double Jeopardy Clause found in the Fifth Amendment to the United States Constitution and comparable prohibitions set forth in Article I, Section 10 of the Ohio Constitution. In Ohio, R.C. 2941.25 codifies these constitutional protections. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, ¶23; *State v. Rance* (1999), 85 Ohio St.3d 632, 634-35. R.C. 2941.25 provides in pertinent part as follows:

> (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.

**{¶61}** "[T]he purpose of R.C. 2941.25 is to prevent shotgun convictions, that is, multiple findings of guilt and corresponding punishments heaped on a defendant for closely related offenses arising from the same occurrence. [*City of Maumee v. Geiger*

(1976), 45 Ohio St.2d 238, 242.] This is a broad purpose and ought not to be watered down with artificial and academic equivocation regarding the similarities of the crimes. When 'in substance and effect but one offense has been committed,' the defendant may be convicted of only one offense. [*State v. Botta* (1971), 27 Ohio St.2d 196, 203.]" *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, ¶43

**{¶62}** In *Johnson*, the Supreme Court modified the test to be applied in determining under the statute whether offenses should merge, discarding the test adopted in *Rance* and modified in *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, which called for an abstract analysis. Under the holding in *Johnson*, "[i]n determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the question is whether it is possible to commit one offense and commit the other with the same conduct, not whether it is possible to commit one without committing the other. * * * If the offenses correspond to such a degree that the conduct of the defendant constituting commission of one offense constitutes commission of the other, then the offenses are of similar import." *Johnson* at ¶48, citing *State v. Blankenship* (1988), 38 Ohio St.3d 116, 119 (Whiteside, J., concurring).

**{¶63}** After determining whether the charged and convicted offenses are otherwise subject to merger, the trial court must then address the second prong of analysis and determine if the offenses arose from the same conduct. "If the multiple offenses *can* be committed by the same conduct, then the court must determine whether the offenses *were* committed by the same conduct, i.e., 'a single act, committed with a single state of mind.' * * * If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged." *Johnson* at ¶49-50 (emphasis

added), quoting *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶50 (Lanzinger, J., dissenting). "[I]f the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge." *Johnson* at ¶51.

**{¶64}** Appellant argues that the felonious assault and attempted murder counts set forth in the indictment are allied offenses committed as a single act with a single animus and should merge for purposes of conviction and sentencing. Without disputing that these two crimes are allied offenses pursuant to the holding in *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, ¶28, and may merge if the facts warrant, the state focuses on the existence in this case of a separate animus for commission of the two offenses, satisfying R.C. 2941.25(B) and constitutional requisites for separate conviction and sentencing. Specifically, the prosecution argues that appellant shot Butler twice, once with the intent of knowingly causing physical harm (felonious assault, R.C. 2903.11) and once in an attempt to purposely cause the death of another (murder, R.C. 2903.02(A), and attempt, R.C. 2923.02). These two shots were separate acts, the state argues, motivated by distinct and separate animus that under *Johnson* must preclude merger.

**{¶65}** The Supreme Court of Ohio's recent decision in *Williams* appears to depart from earlier precedent from that court regarding separate animus, particularly abandoning consideration of factors such as temporal continuum that were examined in cases such as *State v. Cotton*, 120 Ohio St.3d 321, 2008-Ohio-6249 (one victim stabbed three times could not result in a sentence for two felonious-assault convictions because the stabbings resulted from the same animus), and *State v. Harris*, 122 Ohio St.3d 373, 2009-Ohio-

3323 (defendant found guilty of two counts of felonious assault based upon two bullet wounds inflicted upon a single victim in a single volley of gunfire must see convictions merged for sentencing).

**{¶66}** In *Williams*, the accused fired two shots at the victim. One shot struck the victim and instantly paralyzed him; the other shot missed the victim. For each shot fired, the defendant was charged with one count of attempted murder and one count of felonious assault. The Supreme Court determined that for any single gunshot, each felonious-assault offense would merge with its respective ("allied") attempted-murder count. Otherwise stated, for each bullet that was fired at the victim, Williams could be convicted of attempted murder and felonious assault, but not sentenced on both. *State v Monford*, 10th Dist. No. 09AP-274, 2010-Ohio-4732. Because there were two shots fired, however, and a trier of fact could ascertain a separate animus for each, the defendant could be sentenced on two offenses after merger of the original four convictions. Id., citing *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2.

**{¶67}** The implication is that, under *Williams*, even gunshots separated by a very brief interval can be attributed to a separate animus for purposes of establishing distinct offenses and precluding application of the merger doctrine. *Williams* at ¶24. Because appellant in the present case was shot once in the back, and then once in the face as he lay on the ground, the trial court could, although not obligated to do so, properly draw the inference that each gunshot was impelled by a separate animus. We accordingly find no error in refusing to merge the convictions for attempted murder and felonious assault.

**{¶68}** Appellant further argues that the theft count should merge with the robbery counts. As indicted, the theft count was based on appellant taking Butler's car,

considered apart and separate from taking Butler's wallet and car keys as Butler lay on the ground, which formed the basis for the aggravated robbery count. These were separate transactions that could form the basis for distinct theft offenses, and we find no error in this respect. *State v. Houseman* (1990), 70 Ohio App.3d 499, 509 ("Appellant committed aggravated robbery when he committed the theft of [the victim's] car keys * * * while in possession of a deadly weapon or dangerous ordnance. Grand theft was committed when appellant took [the victim's] automobile.").

**{¶69}** Turning to appellant's contention that the aggravated robbery and robbery counts should have merged for sentencing, the state concedes on appeal that it acknowledged at sentencing that these two offenses should merge, and that the state at that time elected to have appellant sentenced for the aggravated robbery conviction. The sentencing entry, however, reflects separate, concurrent sentences for these two offenses. Due to this conceded error, the matter will be remanded to the trial court on this issue.

**{¶70}** In accordance with the foregoing, appellant's fifth assignment of error is sustained in part and overruled in part, and the matter will be remanded to the trial court for resentencing to merge the aggravated robbery and robbery convictions for sentencing purposes.

**{¶71}** Appellant's sixth assignment of error asserts that the trial court should have merged the attempted murder and aggravated robbery counts. Appellant submits no authority to support this proposition, and in fact to so hold would fly in the face of established Ohio criminal jurisprudence expressed in cases too numerous to mention. Appellant's sixth assignment of error is accordingly overruled.

**{¶72}** Appellant's seventh assignment of error challenges the trial court's imposition of consecutive, maximum, and mandatory prison terms and the amount of restitution ordered.

**{¶73}** Appellant first argues that the trial court erred by imposing consecutive sentences without making the findings once required by R.C. 2929.14(E)(4) to overcome the presumption set forth in R.C. 2929.41(A) favoring concurrent sentences. Appellant concedes that, under the Supreme Court of Ohio's ruling in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-56, the requirement of judicial fact finding pursuant to R.C. 2929.14(E)(4) was declared unconstitutional and that portion of the sentencing statute was severed and stricken. Appellant now argues, however, that the United States Supreme Court decision in *Oregon v. Ice* (2009), 555 U.S. 160, 129 S.Ct. 711, nullified the pertinent holding in *Foster* and revived the statutory requirement of judicial fact finding before imposition of consecutive criminal sentences. This court has consistently rejected this argument. See, e.g., *State v. Johnson*, 10th Dist. No. 09AP-1065, 2010-Ohio-3381, and *State v. Busby*, 10th Dist. No. 09AP-1119, 2010-Ohio-4516. The Supreme Court of Ohio has now addressed the issue and our prior cases are consistent with its holding. *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320. *Ice* does not compel resentencing in cases decided under *Foster*.

**{¶74}** Appellant also contends that the trial court erred when it stated that he would be sentenced to a "mandatory 10 years" on each of the attempted murder and aggravated robbery counts. (Sentencing entry, 2.) Appellant bears the burden on appeal of demonstrating that his sentence is contrary to law. *State v. Franklin*, 182 Ohio App.3d 410, 2009-Ohio-2664, ¶8. Both attempted murder and aggravated robbery, as first

degree felonies charged in this case with firearm specifications, require imposition of mandatory prison time, R.C. 2929.13(F)(8), and carry terms of between three and ten years, R.C. 2929.14(A)(1). The ten-year terms imposed by the trial court on each of these counts are lawful. A finding that the trial court could have more clearly expressed that it was imposing mandatory prison time in excess of the minimum would not serve as a formal basis for error.

**{¶75}** Finally, appellant argues that the trial court erred in ordering restitution in the amount of $20,000. The amount of restitution must be supported by competent, credible evidence in the record from which the court can discern the amount of restitution to a reasonable degree of certainty. *State v. Strickland*, 10th Dist. No. 08AP-164, 2008-Ohio-5968, ¶10. R.C. 2929.18(A) permits a trial court imposing a sentence for a felony conviction to include a financial sanction. Id.

**{¶76}** Initially, we note that appellant did not object at sentencing to the trial court's restitution order and thus has waived all but plain error. Crim.R. 52(B); *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642. Again, to constitute plain error, the error must be obvious on the record, palpable, and fundamental such that it should have been apparent to the trial court without objection. *State v. Tichon* (1995), 102 Ohio App.3d 758, 767; *State v. Waddell*, 75 Ohio St.3d 163, 166, 1996-Ohio-100.

**{¶77}** The trial court heard competent, credible evidence to support the restitution order. Although the victim was employed prior to suffering his injuries, he is now unable to work. Butler testified, as did his caregivers, that he had been hospitalized for four and one-half months and that he is permanently paralyzed. As a result, Butler is no longer employed and can no longer provide for his own basic human needs.

**{¶78}** Appellant also argues that the trial court did not consider his ability to pay. The sentencing entry indicates that the trial court did consider his present and future ability to pay the restitution imposed, without giving details. This, however, is sufficient, particularly under a plain error standard, since appellant now articulates no specific argument that he could have presented in the trial court to demonstrate his inability to pay. *State v. Anderson*, 172 Ohio App.3d 603, 2007-Ohio-3849, ¶24.

**{¶79}** We conclude that the trial court did not err in imposing consecutive, maximum, and mandatory prison terms or in imposing restitution. Appellant's seventh assignment of error is overruled.

**{¶80}** Appellant's eighth assignment of error asserts that he was not provided effective assistance of trial counsel as guaranteed under the Sixth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution. In order to prevail on his claim of ineffective assistance of counsel under *Strickland v. Washington* (1984), 466 U.S. 668, 686, 104 S.Ct. 2052, 2064, appellant must show that "counsel's performance fell below an objective standard of reasonableness and that prejudice arose from counsel's performance." *State v. Reynolds* (1998), 80 Ohio St.3d 670, 674.

**{¶81}** "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686, 104 S.Ct. at 2062. Thus, a two-part test is necessary to examine such claims. First, appellant must show that counsel's performance was objectively deficient by producing evidence that counsel acted unreasonably. *State v. Keith*, 79 Ohio St.3d 514, 534, 1997-

Ohio-367. Second, appellant must show that, but for the counsel's errors, there is a reasonable probability that the result of the trial would have been different. Id.

**{¶82}** The burden of showing ineffective assistance of counsel is on the defendant. *State v. Smith* (1985), 17 Ohio St.3d 98. Trial counsel is entitled to a strong presumption that all decisions fall within the wide range of reasonable professional assistance. *State v. Sallie*, 81 Ohio St.3d 673, 675, 1998-Ohio-343. Tactical or strategic trial decisions, even if ultimately unsuccessful, do not generally constitute ineffective assistance. *State v. Carter*, 72 Ohio St.3d 545, 558, 1995-Ohio-104 ("Judicial scrutiny of counsel's performance is to be highly deferential, and reviewing courts must refrain from second-guessing the strategic decisions of trial counsel."); *State v. Carpenter* (1996), 116 Ohio App.3d 615, 626 (court of appeals is to "presume that a broad range of choices, perhaps even disastrous ones, are made on the basis of tactical decisions and do not constitute ineffective assistance"). Applying these standards, we find that appellant has failed to show that his trial counsel was ineffective.

**{¶83}** The first argument advanced in support of appellant's ineffective assistance claim is that trial counsel filed the written motion to suppress out-of-rule under Crim.R. 12(D) and with a lack of specificity. As indicated by our analysis under appellant's first assignment of error, the trial court did not err in overruling appellant's suppression motion. Moreover, we disposed of the first assignment without reference to or reliance upon the lack of specificity in the motion or the fact that the motion was filed out-of-rule. Consequently, we find no basis to support that these alleged errors on the part of trial counsel contributed to the outcome of the proceedings.

**{¶84}** Appellant also argues that trial counsel repeatedly failed to object to numerous instances of hearsay testimony. For several of these, appellate counsel does not develop any argument to establish that the alleged hearsay had a prejudicial impact. Accordingly, regarding these unsupported allegations of ineffective assistance, we need not consider whether there was error. Two cited instances, however, present the possibility for prejudice: (1) testimony by a responding Columbus police officer, Officer Lang, that Butler, when approached by police as he lay wounded on the ground, identified appellant as the shooter; and (2) testimony by Detective Boesch repeating assertions by Butler that appellant had shot him. Both statements were introduced to explain the events on the night in question and divulged why police immediately sought out and arrested appellant.

**{¶85}** Out-of-court statements offered to explain officer conduct are admissible if the conduct to be explained is relevant, unequivocal, and contemporaneous with the contested statements, and further meets the standards for admissibility under Evid.R. 403(A). *State v. Blevins* (1987), 36 Ohio App.3d 147, 149; *State v. Nabinger* (June 13, 1995), 10th Dist. No. 94AP-981. Of note, Butler gave his personal testimony in the case, which far outweighed any corroborative hearsay testimony offered by police witnesses. As such, the alleged hearsay statements were merely cumulative and without discernable possibility for prejudicial impact in the jury's assessment of appellant's guilt. We therefore find no basis to conclude that trial counsel was ineffective for failure to object to the alleged hearsay.

**{¶86}** Appellant further argues that trial counsel was ineffective because counsel did not attempt to exclude the use of the coat worn by appellant on the night in question

or the subsequent BCI testing that revealed gunshot residue on the coat. Appellant contends that testimony by Detective Boesch establishes that the coat was transferred several times when in the hands of the prosecution and testing labs and that insufficient chain of custody testimony was heard at trial.

**{¶87}** We opine that appellant's coat would not have been found inadmissible on the bases advanced by appellant. The state is not required to prove a perfect, unbroken chain of custody for evidence to be admissible. *State v. Gross*, 97 Ohio St.3d 121, 2002-Ohio-5524, ¶57. Any breaks in the chain of custody go to the weight afforded to the evidence, not to its admissibility. *State v. Wallace*, 10th Dist. No. 08AP-2, 2008-Ohio-5260, ¶27; *State v. Brown* (1997), 107 Ohio App.3d 194; *State v. Parsley*, 10th Dist. No. 09AP-612, 2010-Ohio-1689, ¶29. Any attempt to object to admission of the coat and test results would have been unlikely to affect the outcome of trial. We therefore find that counsel was not deficient in failing to object to the evidence regarding appellant's coat.

**{¶88}** Finally, appellant argues that trial counsel made inadequate use of the "miscellaneous report" involving Butler's prior involvement with abuse of prescription drugs. As described under appellant's third assignment of error, counsel attempted to exploit the late disclosure of a portion of this report by moving for dismissal of the case. Furthermore, counsel employed the report in an attempt to impeach Butler upon his recall to the stand and to establish that Butler possessed other motives for going to the apartment complex where he was shot.

**{¶89}** We conclude that trial counsel did not commit errors so serious that representation fell below the level of counsel guaranteed by the constitution. Appellant's eighth assignment of error is overruled.

**{¶90}** In summary, appellant's first, second, third, fourth, sixth, seventh and eighth assignments of error are overruled. Appellant's fifth assignment of error is sustained in part and overruled in part, and the matter is remanded to the trial court for resentencing to allow the merger of the aggravated robbery and robbery charges. The judgment of the Franklin County Court of Common Pleas is affirmed in all other respects.

*Judgment affirmed in part, reversed in part, and cause remanded with instructions.*

BROWN and FRENCH, JJ., concur.

HENDRICKSON, J., of the Twelfth Appellate District, sitting by assignment in the Tenth Appellate District.