[Cite as *State v. Norman*, 2013-Ohio-1908.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 12AP-505
v.	:	(C.P.C. No. 11CR-01-159)
Brian L. Norman,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on May 9, 2013

Ron O'Brien, Prosecuting Attorney, and *Valerie B. Swanson*, for appellee.

Shaw & Miller, and *Mark J. Miller*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶ 1} Defendant-appellant, Brian L. Norman, appeals from a judgment of conviction and sentence entered by the Franklin County Court of Common Pleas. For the reasons that follow, the judgment of the trial court is affirmed in part and reversed in part, and this matter is remanded to the trial court for additional proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND

{¶ 2} Appellant was indicted by a Franklin County Grand Jury on one count of burglary, a second-degree felony, in violation of R.C. 2911.12, and two counts of theft, one a fourth-degree felony and one a fifth-degree felony, both in violation of R.C. 2913.02. The charges herein arose from a burglary that occurred during the early morning hours of

November 10, 2010. During the relevant timeframes of this case, John Maddox, a professional gambler, lived with his daughter and his mother, Shizuko Maddox, at 5421 Teakwood Court in Columbus, Ohio. Approximately one and one-half years before this incident, John met Kara Styles at the gentlemen's club where she worked and the two became friends. According to John, while he initially sought to date Kara, he stopped pursuing her romantically sometime in May or June 2010. Though appellant is the father of Kara's three children and Kara has lived with appellant "off and on for nine, eight or nine years," Kara introduced appellant to John as her brother, Josh Styles. (Tr. 236.) According to Kara, during her one to one and one-half year friendship with John, he and appellant "hung out" often but at no time was appellant's real identity divulged to John. (Tr. 240.) Kara also testified that John would often buy things for her and loan money to appellant.

{¶ 3} Shizuko testified that on November 10, 2010, after she and her granddaughter went to bed, she was woken by a "lot of noise." (Tr. 221.) Shizuko stated she went downstairs and found the kitchen window and back door open and noticed several items missing from the home. According to Shizuko, missing from the home were three watches, valued at $125, $95, and $85, respectively, a $280 Coach purse, $1,400 in cash, and a laptop computer that she believed was purchased for approximately $895.

{¶ 4} John testified that although he and appellant had hung out together, appellant had only been to his house on one occasion in order to borrow $20 and was "in and out like one minute." (Tr. 257.) On the night his house was burglarized, John was at his girlfriend's house. John testified appellant called him at approximately 1:30 a.m. on November 10, 2010 and asked to borrow money, but John told appellant that he was not at home and that he would not loan him any money. John then received a phone call from his daughter around 3:00 a.m. informing him that they had been "robbed" and that the police were there. (Tr. 260.) Therefore, John returned home. According to John, he did not learn of appellant's true identity or relationship to Kara until the police informed him of it a month after the burglary.

{¶ 5} Columbus Police Officer Rick Crum testified that on November 10, he was dispatched between 3:00 and 3:30 a.m. to John's residence on a burglary in progress. The point of entry into the residence was determined to be a kitchen window

approximately seven feet from the ground, and the point of exit was determined to be the back door. Officer Crum found a black jacket on the ground outside of the kitchen window. Additionally, Officer Crum was able to take fingerprints from the kitchen window.

{¶ 6} Testing established the fingerprints collected at the scene matched the known prints of appellant. DNA testing revealed appellant could not be excluded as one of the contributor's whose DNA was found on the jacket.

{¶ 7} After the presentation of the above-described evidence, the state rested. Appellant made a motion for acquittal, pursuant to Crim.R. 29, and a motion for a mistrial based on the state's alleged withholding of Crim.R. 16 discovery materials. The trial court denied both motions. Thereafter, appellant indicated he would be testifying on his own behalf and calling Columbus Police Detective David Samuel as a witness.

{¶ 8} Detective Samuel testified that in mid-December 2010, he interviewed John, who, according to Detective Samuel, was surprised to learn of appellant's true identity. Detective Samuel also testified that John stated appellant had been to his house "two or three" times. (Tr. 391.) Additionally, Detective Samuel testified regarding his interview of appellant on December 22, 2010, wherein appellant admitted the game he and Kara had run on John, but denied being involved in the burglary of John's house. According to Detective Samuel, appellant stated that, prior to November 10, he had been to John's house several times and had also been in the backyard where he and John smoked marijuana. Appellant stated he knew about the burglary because John had told him about it after it had happened. When asked how his fingerprints would have come to be found on the window, appellant stated John may have placed them there.

{¶ 9} Appellant testified on his own behalf. Appellant admitted introducing himself to John as Kara's brother, Josh Styles. Appellant testified John had given him money on several occasions, including one instance when John gave him $3,000. According to appellant, John gave him $150 the night before this incident occurred. Appellant denied calling John and asking for money on November 10 and further denied having any involvement in the burglary.

{¶ 10} Additionally, appellant testified he had been inside of John's house two or three times and smoked marijuana in the backyard with John. When asked about his

fingerprints on the window, appellant stated, "They say they got my fingerprints. That's the only way it could have been there was accidentally touching it." (Tr. 469.) Appellant also testified that during the evening of November 9, 2010, he was with Jeff Warden and Tony Campbell at Tony's house, and that they stayed there the entire night until the following morning.

{¶ 11} The jury found appellant guilty of all charges. For sentencing purposes, the trial court merged the two theft counts into the burglary count and sentenced appellant to a three-year term of incarceration. Additionally, appellant was ordered to pay $2,730 in restitution and was awarded 26 days of jail-time credit.

II. ASSIGNMENTS OF ERROR

{¶ 12} This appeal followed, and appellant brings the following six assignments of error for our review:

> I. The prosecutor engaged in prosecutorial misconduct during trial by improperly arguing that the defendant had a duty to update his notice of alibi and to disclose or file his notice of alibi more promptly, thus depriving the defendant his right to a fair and impartial trial.
>
> II. The trial court committed reversible error by failing to hold an evidentiary hearing to determine the amount of restitution owed by the appellant.
>
> III. The trial court abused its discretion in failing to give his requested jury instruction pursuant to *State v. Martens*, 90 Ohio App.3d 338, and also erred in failing to grant appellant's motion for mistrial.
>
> IV. The trial court abused its discretion in failing to give his requested jury instruction regar[d]ing inferences.
>
> V. The trial court abused its discretion in denying appellant's motion for mistrial because the state failed to disclose several potential witnesses as required by Criminal Rule 16.
>
> VI. The trial court's cumulative errors deprived the appellant of a fair trial even if one error alone did not rise to that level.

III. DISCUSSION

{¶ 13} For ease of discussion, appellant's assigned errors will not be discussed in the order presented as we will discuss appellant's second assignment of error out of order.

A. First Assignment of Error

{¶ 14} In his first assignment of error, appellant argues the prosecutor engaged in prosecutorial misconduct by improperly referencing his alibi during his cross-examination, during the cross-examination of Detective Samuel, and during closing arguments.

{¶ 15} The test for prosecutorial misconduct is whether the remarks were improper, and, if so, whether they prejudicially affected the accused's substantial rights. *State v. Smith*, 14 Ohio St.3d 13, 14 (1984); *State v. Howard*, 10th Dist. No. 08AP-177, 2009-Ohio-2663, ¶ 31. The touchstone of the analysis "is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips*, 455 U.S. 209, 219 (1982). The prosecutor's conduct cannot be grounds for a new trial unless the conduct deprives the defendant of a fair trial. *State v. Keenan*, 66 Ohio St.3d 402, 405 (1993). In considering prejudice, we must consider the following factors: (1) the nature of the conduct, (2) whether counsel objected, (3) whether the court gave corrective instructions, and (4) the strength of the evidence against the defendant. *State v. Tyler*, 10th Dist. No. 05AP-989, 2006-Ohio-6896, ¶ 20.

{¶ 16} According to appellant, the first instance of prosecutorial misconduct occurred during the state's cross-examination of defense witness Detective Samuel, wherein the following exchanged occurred:

> Q. [D]id you at some point have information about a possible alibi in this case?
>
> A. Yes. I was later informed that he may have an individual that claimed had been with Mr. Norman during the incident.
>
> Q. When did that first come to your attention?
>
> A. You called me up and advised me.
>
> Q. Do you recall about when that was?

> A. Oh, boy, probably couple months ago. I don't recall when you called exactly.
>
> Q. So would it have – we're April now – either beginning of 2012 maybe end of 2011?
>
> A. Yes.
>
> Q. But your interview with the defendant was back in December 2011?
>
> A. Uh-huh.
>
> Q. So we're talking maybe almost a year before you ever got any information about a possible alibi?
>
> A. Yes, ma'am.

(Tr. 408.)

{¶ 17} Appellant contends the above-described exchange constituted an improper elicitation of evidence regarding the date on which he filed his notice of alibi. Appellant did not object to this questioning during trial; therefore, we review this issue using a plain-error analysis pursuant to Crim.R. 52(B). *State v. Saleh*, 10th Dist. No. 07AP-431, 2009-Ohio-1542, ¶ 68 (no objection to alleged prosecutorial misconduct during cross-examination reviewed under plain-error standard); *State v. Williams*, 79 Ohio St.3d 1, 12 (1997) (applying the plain-error standard to a prosecutorial misconduct claim).

{¶ 18} 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 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*. Prosecutorial misconduct allows for a reversal under the plain-error standard if it is clear that the defendant would not have been convicted in the absence of the improper conduct. *Saleh* at ¶ 68.

{¶ 19} In support of argument that the prosecutor's cross-examination was improper, appellant relies on *State v. Tolbert*, 70 Ohio App.3d 372 (1st Dist.1990), in which the defendant challenged the prosecutor's cross-examination and closing

arguments as they pertained to the defendant's alibi defense. The *Tolbert* court recognized the holding of *State v. Sims*, 3 Ohio App.3d 331 (8th Dist.1982), which held that when a notice of alibi has been timely filed, it is error for the court to permit the prosecutor to adduce evidence of the date the defendant filed the notice of alibi. *Sims*' reasoning was that a failure to file a notice of alibi promptly is not probative of guilt because, under Crim.R. 12.1, such a notice need not be filed until seven days before trial.

{¶ 20} In *Tolbert*, during the cross-examination of the defendant, the prosecutor implied the defendant's alibi was fabricated because it was not filed until ten days prior to the commencement of trial. Specifically, the prosecutor asked the defendant what date was contained on the notice of alibi. No objections were made during the challenged testimony, and the court reviewed the matter under a plain-error standard. In light of *Sims*, the *Tolbert* court found it error to allow the prosecutor to adduce evidence concerning the date the notice of alibi was filed, but, due to the overwhelming evidence presented by the prosecution, such did not constitute plain error.

{¶ 21} In the case before us, the prosecutor's cross-examination of Detective Samuel does not elicit the date on which the notice of alibi was filed. Instead, the prosecutor sought to determine when the detective became aware of appellant's alibi. As the court in *Tolbert* recognized, "[T]he prosecution's statements concerning the filing and merit of the defendant's alibi are a different matter." *Tolbert* at 380 (no error in inquiry of when defense counsel became aware of defendant's alibi). Further, appellant's counsel initially raised the issue of appellant's alibi during his direct examination of Detective Samuel as appellant's counsel asked, "Do you recall if you ever asked [appellant] where he was on the evening on November 10, 2010?" (Tr. 391.) Detective Samuel responded, "I don't recall. I did tell him the date and time." (Tr. 391.) Thus, we conclude the cross-examination of Detective Samuel does not run afoul of the holdings of *Tolbert* or *Sims* and constitute prosecutorial misconduct. *See State v. Haddix*, 12th Dist. No. CA2011-07-075, 2012-Ohio-2687, discretionary appeal not allowed, 133 Ohio St.3d 1425, 2012-Ohio-4902 (no error where prosecution did not comment on the date notice of alibi was filed, but, rather, cross-examined the defendant on his own testimony about not telling police about alibi because he did not think the allegations were serious).

{¶ 22} Appellant contends the second instance of prosecutorial misconduct occurred during the cross-examination of appellant, in which the following exchange occurred:

> Q. Mr. Norman, I want to talk to you about this Tony Campbell. That's his name?
>
> A. Yes, ma'am.
>
> Q. Tony Campbell. Okay. Where does he live currently?
>
> A. He's actually just got out of the hospital. And he's staying with his mother which is in like Grove City, I want to say. Pickerington. Pickerington, that's what it is. Pickerington.
>
> Q. So you still have contact with this person?
>
> A. Yes, I do.
>
> * * *
>
> Q. You know he moved, right?
>
> A. Yes, I did.
>
> Q. Did you ever give the detective his new address?
>
> A. I never talked to the detective after that interview.
>
> Q. Did you ever give your attorney his address?
>
> A. Yes, I sure did. Where? To his mom's? Where he's at now?
>
> Q. His current address so we could locate and talk to him.
>
> A. I don't know the address number but I told him he was with his mom.
>
> Q. Okay. But you didn't give him the information about where to find this person?
>
> A. I told him he was at his mom's. I just don't know the address. I don't know the address. I can't give it to them if I don't have it.

Q. Well, you're still in contact with Tony Campbell so surely you have a phone number for him?

A. Yes, ma'am, I do.

* * *

Q. Did you give that to your defense attorneys?

A. Yes.

Q. And are you aware then that they have an obligation to disclose that to me?

A. No, I'm not aware of that.

Q. Okay. Are you aware that no such number was ever disclosed to me?

A. I'm not aware of that.

* * *

Q. Okay. And you were indicted on this case back in January 2011, right?

A. Right. I didn't know that I even had a warrant until they actually caught me. So maybe I was indicted then, but I didn't know about it until way later.

* * *

Q. When did you get an attorney?

A. After I got arrested and found out.

Q. Which was when?

A. Let me see, say March, I want to say March.

Q. Okay. So surely at that point you told your attorneys about Tony Campbell, right?

A. No. I mean it was – maybe when it came up, you know, he asked me – I don't think it was like right off the bat I think. It was a little bit later when we got into the case. Because I

didn't just say, hey, there's Tony Campbell, blah, blah, blah, I mean.

Q. You said March, maybe April 2011; is that fair?

A. It might a took a few months. Because he got the case, you know, had to file for a motion. It took a little while.

Q. So you didn't think that was important enough to tell them right off the bat, hey, it couldn't have been me because I was here with Tony Campbell?

[Appellant's counsel]: Objection. This has been asked and answered.

THE COURT: Overruled.

Q. You didn't think it was important to tell your attorneys when you first hired them?

A. Well, when I hired them I was in jail so how was I gonna tell them.

* * *

Q. So when was the first time you talked to your attorneys on this case?

[Appellant's counsel]: Objection. This is really attorney/client privilege.

THE COURT: Counsel, you brought this issue up regarding the alibi.

[Appellant's counsel]: Objection.

THE COURT: So noted.

A. I want to * * * say maybe in June I told him about it.

* * *

Q. Can you read what that says, the title of this document? The title of the document?

A. Oh. Notice of Alibi.

> Q. Okay. And does it appear to be filed by your attorneys in this case?
>
> A. That says Judge Schneider. Oh, yes. Yes. Right here. Yes. This says Mark Miller and Shaw Miller.
>
> Q. Does it have a date when this document was filed?
>
> A. Says August 2nd.
>
> Q. Okay. So does it surprise you then, Mr. Norman, that you told your attorneys about this alibi at least in June?
>
> A. Maybe.
>
> Q. Even though you were arrested back in March. But then the Notice of Alibi wasn't filed until August?
>
> A. I told them.

(Tr. 443-45, 454-57.)

{¶ 23} Though appellant argues we should not utilize the plain-error standard of review in this instance because his counsel objected at various times during his cross-examination, a review of the transcript reveals the objections were not based on the reasons now asserted. Specifically, appellant's counsel did not object on the basis of improper questioning regarding the date the notice of alibi was filed. Instead, a review of the transcript, as we have quoted above, demonstrates objections were lodged on the basis that the question had been asked and answered and on the basis of attorney-client privilege. " 'An objection to evidence on one ground does not preserve an objection on another ground, absent plain error.' " *State v. Jewett*, 10th Dist. No. 11AP-1028, 2013-Ohio-1246, ¶ 63, quoting *State v. Barnes*, 10th Dist. No. 04AP-1133, 2005-Ohio-3279, ¶ 28. Thus, we apply the plain-error standard to the alleged instance of prosecutorial misconduct.

{¶ 24} Initially, we note that on direct examination, appellant testified that, at the time of the burglary, he was at Tony Campbell's "drinking a little bit, watching I think it was the basketball game." (Tr. 438.) Also on direct examination, appellant testified he knew Tony had moved, and he had provided information about Tony to his trial counsel.

Additionally, appellant testified to reasons why the jury would not be hearing testimony from Tony.

{¶ 25} As the above-challenged cross-examination establishes, the majority of the prosecutor's questions regarding appellant's alibi do not concern the date appellant's notice of alibi was filed, but instead focus on when appellant's counsel became aware of the alibi and the lack of evidence corroborating appellant's alibi testimony. Additionally, after the defense rested, the trial court stated to the jury:

> One other thing I would like to clear up. There may have been an implication on this alibi issue. Under the law if a defendant says I wasn't at location A, I was at location B, that's the alibi. They have the duty under the Criminal Rules to inform the state of that to say where they were. It ends there.
>
> There's not a duty to further update that address or update the location of people who might have been at that address. It ends. The Notice of Alibi ends at that moment. The defense satisfied that notice requirement under the rules of imply [sic] to alibi. To the extent that there might have been any implication, I don't think anybody's implying anything devious, that there was a duty to say where this person is, was, that doesn't exist.

(Tr. 484-85.)

{¶ 26} A jury is presumed to follow the trial court's instructions. *State v. Sullivan*, 10th Dist. No. 10AP-997, 2011-Ohio-6384, ¶ 31; *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶ 86. There is nothing in the record indicating that the jury failed to do so here.

{¶ 27} Moreover, while the prosecutor eventually did elicit the date upon which the notice of alibi was filed, we cannot conclude the admission of such evidence constitutes plain error. Not only was the jury cautioned with respect to the use of such evidence, but, also, the remaining evidence in this case is such that we cannot say it is clear appellant would not have been convicted in the absence of the alleged improper conduct. *Saleh* at ¶ 68.

{¶ 28} Lastly, appellant challenges the following portion of the prosecutor's closing argument:

He told you he was arrested in March 2011. So that was his excuse for not telling anybody before that. Because clearly when you're confronted with a crime, you're not going to tell them why you didn't do it. Okay. He didn't say anything until March. But then he got attorneys. His explanation was he didn't say anything until June. His Notice of Alibi was filed –

[Appellant's counsel]: Objection.

THE COURT: Was –

[Prosecutor]: Was filed.

THE COURT: Again this is closing statement. You know it's up to you to recall as to what was said and wasn't said. And it's counsel view. It's not evidence. Do not consider it for any purpose.

[Prosecutor]: We talked about his Notice of Alibi that was filed in August 2011, the first official notice August 2011. "I wasn't there because I was here. I was with this person." August 2011. Crime was November 2010.

Ladies and gentlemen of the jury, it is 10:00, if the detective came up to you tomorrow and said I'm accusing you, I think that you committed this burglary at 10:00 yesterday, what is the first thing you're going to say to him? Of course it wasn't me. I was sitting on jury panel in Courtroom 5A. Go talk to the other jurors. Go talk to the judge. There's a roomful of people who can say I was here. That's what you do when you're confronted with a crime. You don't wait, what is that, a year, year and a half?

[Appellant's counsel]: Objection.

THE COURT: To the extent that counsel's speculating as to any inference as to an event, an alleged event, a filing of a document, there is no requirement that the document be filed the day of, the day after, whatever. Actually rules are seven days prior to trial.

Counsel's entitled to speculate as to what all that means, and you can consider that for whatever purpose you want. To the extent counsel's asking you what you would do, you must not do that. That is inappropriate. It is not what you would do. It has nothing to do with you. So to the extent that counsel

> asked you as to what you would do, you are to ignore that. To the extent that counsel's speculating as to what the timeframe may be, I'll give you instructions on inferences. What you do with it is up to you.

(Tr. 509-10.)

{¶ 29} During her rebuttal closing argument, the prosecutor stated:

> An alibi, it's not an obligation. I'm not talking about the legal obligation. I'm talking about common sense. You're charged with a crime. You say you were somewhere else if you were somewhere else. That is common sense. The detective wants the right person. The state wants the right person. We're not here today if that alibi panned out. We're not here today if we knew that Tony Campbell, James Campbell, if that panned out, folks, this case goes away. You don't wait with an alibi. If that's verifiable, if it can be corroborated, it's proven, and we don't get to this point. It is a bunch of junk.
>
> [Appellant's counsel]: Objection.
>
> THE COURT: Overruled.
>
> Again, I will remind you for the last time, hopefully, this is counsel's view, it's up to you to decide. I will give you instruction on how to view the evidence. And it will be up to you to decide. It will be up to you. Remember what you believe a witness said, not what counsel characterizes it.
>
> [Prosecutor]: Thank you, judge.
>
> Common sense, ladies and gentlemen. Common sense. That alibi doesn't fly. Would have been disclosed, would have told the detective, would have heard from one of those people, would have heard one of them backing that up. There is no corroboration. There's nothing at all other than this man's word, and that's not worth anything.

(Tr. 534-35.)

{¶ 30} A prosecutor is afforded a certain degree of latitude in his concluding remarks and may draw reasonable inferences from evidence at trial and may comment on those inferences during closing argument. *State v. Hairston*, 10th Dist. No. 01AP-252 (Sept. 28, 2001), appeal not allowed, 94 Ohio St.3d 1433 (2002); *State v. Thomas*, 10th

Dist. No. 02AP-778, 2003-Ohio-2199. "The test regarding prosecutorial misconduct in closing arguments is whether the remarks were improper and, if so, whether they prejudicially affected substantial rights of the defendant." *Smith* at 14. A defendant is entitled to a new trial only when a prosecutor makes improper remarks and those remarks substantially prejudice the defendant. *Id*.

{¶ 31} To determine if the alleged misconduct resulted in prejudice, we must consider " '(1) the nature of the remarks, (2) whether an objection was made by counsel, (3) whether corrective instructions were given by the court, and (4) the strength of the evidence against the defendant.' " *Tyler* at ¶ 20, quoting *State v. Braxton*, 102 Ohio App.3d 28, 41 (8th Dist.1995), discretionary appeal not allowed, 73 Ohio St.3d 1425 (1995). In addition, the prosecutor's conduct must be considered in the context of the entire trial. *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, citing *Keenan* at 410. The touchstone of this analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, rather than the culpability of the prosecutor. *Phillips* at syllabus. It is long-standing precedent that the prosecution may comment upon an accused's failure to offer evidence in support of his case. *State v. D'Ambrosio*, 67 Ohio St.3d 185, 193 (1993); *State v. Williams*, 23 Ohio St.3d 16, 20 (1986); *State v. Champion*, 109 Ohio St. 281, 289-90 (1924).

{¶ 32} In the instant case, it is apparent that the majority of what appellant challenges is commentary regarding the relative strength of appellant's alibi given that neither appellant nor any of the alibi witnesses discussed appellant's alibi with the investigating detective. These were fair comments on the evidence and, therefore, were not improper. *State v. Elersic*, 11th Dist. No. 2000-L-145, 2002-Ohio-2945 (closing argument discussing failure of alibi witnesses to come forward to investigating officers prior to trial was a fair representation of the evidence, thus not improper); *State v. Hirsch*, 129 Ohio App.3d 294 (1st Dist.1998) (same); *Haddix* (no error discussing defendant's testimony that he failed to provide police an alibi because he did not think allegations were serious). Furthermore, to the extent the prosecutor improperly commented on the date of the notice of alibi, it did not prejudicially affect the substantial rights of appellant, as the trial court promptly gave a curative instruction explaining there

is no requirement that a notice of alibi be filed at any specified time so long as it is filed seven days prior to trial.

{¶ 33} Viewing the prosecutor's comment regarding the date the notice of alibi was filed in the context of the entire trial and in light of the instruction given by the trial court, along with the presumption that juries obey instructions from the court, we cannot conclude appellant's substantial rights were prejudicially affected here. *Elersic*; *Hirsch*.

{¶ 34} For all of the foregoing reasons, appellant's first assignment of error is overruled.

B. Third Assignment of Error

{¶ 35} In his third assignment of error, appellant contends the trial court erred in failing to give his requested jury instruction, pursuant to *State. v. Martens*, 90 Ohio App.3d 338 (3d Dist.1993), and in failing to grant a mistrial.

{¶ 36} We review a trial court's refusal to provide a requested jury instruction for an abuse of discretion. *State v. Wolons*, 44 Ohio St.3d 64, 68 (1989). Generally, "a trial court must fully and completely give the jury all instructions which are relevant and necessary for the jury to weigh evidence and discharge its duty as the fact finder." *State v. Comen*, 50 Ohio St.3d 206 (1990), paragraph two of the syllabus. " '[I]f the law is clearly and fairly expressed, a reviewing court should not reverse a judgment.' " *State v. Adams*, 3d Dist. No. 3-06-24, 2007-Ohio-4932, ¶ 27, quoting *State v. Pope*, 3d Dist. No. 13-06-05, 2006-Ohio-4318, ¶ 11. Reversal is appropriate only if the instruction given in error is so misleading so as to prejudice the party seeking reversal. *State v. Harry*, 12th Dist. No. CA2008-01-013, 2008-Ohio-6380, ¶ 34.

{¶ 37} The jury began deliberating at 1:00 p.m. on March 29, 2012 and retired for the day at 4:45 p.m. The jury resumed deliberations the following morning. At 2:30 p.m., the jury submitted three questions to the court. The first asked, "What happens if we cannot come to a unanimous decision?" (Tr. 556.) The second asked, "If deliberations go into next week and we have a juror who cannot be here, what happens?" (Tr. 556.) The third stated, "We have decided that we are unable to come to a unanimous decision. Further deliberations will not change the ratio." (Tr. 560.)

{¶ 38} In addressing the second question, the trial court instructed the jury that, if it became necessary to replace a current juror, the court would designate an alternate

juror and deliberations would begin anew. With respect to the first and third questions, the trial court explained to the jury that it would address them as one and did so with a modified *Howard*[1] charge. The instruction advised the jurors as follows:

> The principal mode, provided by our Constitution and laws, for deciding questions of fact in criminal cases is by jury verdict. In a large proportion of cases absolute certainty cannot be attained or expected. Although the verdict must reflect the verdict of each individual juror and not mere acquiescence in the conclusion of the other jurors, each question submitted to you should be examined with proper regard and deference to the opinions of others.
>
> You should consider it desirable that the case be decided. You are selected in the same manner and from the same source as any future jury would be. There is no reason to believe that the case will ever be submitted to a jury more capable, impartial, or intelligent than this one. Likewise, there is no reason to believe that more or clearer evidence will be produced by either side.
>
> It is your duty to decide the case if you can conscientiously do so. You should listen to one another's arguments with a disposition to be persuaded.
>
> Do not hesitate to re-examine your views and change your position if you are convinced that it is erroneous. If there is disagreement, all jurors should re-examine their positions, given that a unanimous verdict has not been reached.
>
> And jurors who favor a finding of not guilty should consider whether their doubt as to the existence of proof beyond a reasonable doubt is appropriate, considering that it is not shared by other equally honest jurors who have heard the same evidence with the same desire to arrive at the truth and under the same oath.
>
> Likewise, jurors who favor a verdict of guilty should ask themselves whether they might not reasonably doubt the correctness of a judgment not concurred in by all other jurors.
>
> That is in response – excuse me. I want to add to that. If there is a possibility of reaching a verdict, you should continue

[1] *State v. Howard*, 42 Ohio St.3d 18 (1989).

> your deliberations. That concludes my answer to questions one and three.

(Tr. 564-66.)

{¶ 39} Appellant's counsel objected to the modified *Howard* charge and requested that the trial court use an instruction taken from *Martens*, which discussed the impossibility of reaching a verdict. Specifically, appellant argued that, because a reasonable time had passed and the jury affirmatively stated they were deadlocked, the following instruction from paragraph three of 2-CR 429 OJI CR 429.09 was appropriate:

> VERDICT IMPOSSIBLE. It is conceivable that after a reasonable length of time honest differences of opinion on the evidence may prevent an agreement upon a verdict. When that condition exists you may consider whether further deliberations will serve a useful purpose. If you decide that you cannot agree and that further deliberations will not serve a useful purpose you may ask to be returned to the courtroom and report that fact to the court. If there is a possibility of reaching a verdict you should continue your deliberations.

{¶ 40} The court refused to give this instruction, explaining:

> My reluctance or lack of enthusiasm for that proposed addition comes from the fact that the whole purpose of the Howard Charge is to instruct the jury that they have a responsibility to follow through with arriving at a fair and just verdict.
>
> I react to this portion that I will not be including in my response to the jury as a certainty that, after having read the Howard Charge, and almost a certainty that after having read the Howard Charge with this addition, that the jury would be back almost immediately saying we have already told you we can't arrive at a verdict, and we will tell you again. That would defeat the purpose of the Howard Charge.
>
> I appreciate the fact this is a Friday and it is a very sunny day. It is 2:30. This jury has already been working on three counts for approximately seven hours. And I think these questions do not bode well for a verdict in this case.
>
> With all that said, I am not going to cave in to expediency to avoid trying to get this jury to discharge in a fair and equitable fashion their responsibilities.

(Tr. 561.)

{¶ 41} Whether the jury is irreconcilably deadlocked is essentially " 'a necessarily discretionary determination' " for the trial court to make. *State v. Brown*, 100 Ohio St.3d 51, 2003-Ohio-5059, ¶ 37, quoting *Arizona v. Washington*, 434 U.S. 497, 510 (1978), fn. 28. In making such a determination, the court must evaluate each case based on its own particular circumstances. *Id.*, citing *State v. Mason*, 82 Ohio St.3d 144, 167 (1998). There is no bright-line test to determine what constitutes an irreconcilably deadlocked jury. *Id*. In fact, as the Supreme Court of Ohio stated, "No exact line can be drawn as to how long a jury must deliberate in the penalty phase before a trial court should instruct the jury to limit itself to the life sentence options or take the case away from the jury, as done in [*State v. Springer*, 63 Ohio St.3d 167 (1992)]." *Mason* at 167.

{¶ 42} As the court in *Brown* explained, it had twice upheld the use of a *Howard* charge instead of a *Martens* charge, finding the *Howard* charge is " 'intended for a jury that believes it is deadlocked, so as to challenge them to try one last time to reach a consensus.' " *Brown* at ¶ 38, quoting *State v. Robb*, 88 Ohio St.3d 59, 81 (2000); *see also Mason* at 167. In finding no abuse of discretion in the trial court's failure to give the *Martens* instruction in *Brown*, the court noted that, even though the jurors deliberated for over 11 hours, they never advised the court, after their initial deadlock, that they were unable to reach a verdict. "Thus, the court acted within its discretion in refusing to give the *Martens* instruction regarding the impossibility of reaching a verdict. Even the *Martens* court itself, in refusing to require the instruction in that case, acknowledged that such an instruction should not be given prematurely. Otherwise, 'the instruction may be contrary to the goal of the *Howard* charge of encouraging a verdict where one can conscientiously be reached.' " *Brown* at ¶ 38, quoting *Martens* at 343. *See also State v. Hawk*, 5th Dist. No. 2009 CA 000028, 2009-Ohio-6965; *State v. Sanders*, 12th Dist. No. CA2003-12-311, 2004-Ohio-6320; *State v. Edwards*, 11th Dist. No. 2006-T-0038, 2006-Ohio-6349; *State v. Young*, 7th Dist. No. 07 MA 120, 2008-Ohio-5046.

{¶ 43} In the present case, though deliberating for over seven hours, the jury did not advise the court, after their initial deadlock, that they were unable to reach a verdict. In contrast, after hearing the court-modified *Howard* charge, the jury made no further inquiries of the court and, instead, continued deliberations without hesitation. Because

there was not a clear indication in this case that the jurors would be unable to reach a verdict, we conclude the trial court acted within its discretion in giving the modified *Howard* charge and refusing to give the *Martens* charge.

{¶ 44} Accordingly, appellant's third assignment of error is overruled.

C. Fourth Assignment of Error

{¶ 45} In his fourth assignment of error, appellant contends the trial court erred in refusing to give his requested jury instruction regarding inferences.

{¶ 46} If the proposed instruction for the jury is correct, pertinent and timely presented, the trial court must include it, at least in substance, in the general charge. *State v. Guster*, 66 Ohio St.2d 266, 269 (1981), citing *Cincinnati v. Epperson*, 20 Ohio St.2d 59 (1969), paragraph one of the syllabus. However, "The trial court need not give a proposed instruction in the precise language requested by its proponent, even if it properly states an applicable rule of law. The court retains discretion to use its own language to communicate the same legal principles." *Youssef v. Parr, Inc.*, 69 Ohio App.3d 679, 691 (8th Dist.1990). Ultimately, we need not disturb a trial court's refusal to give a requested jury instruction absent an abuse of discretion. *Wolons* at 68.

{¶ 47} The instruction requested by appellant stated:

> Whether an inference is made rests entirely with you. You must bear in mind that if the circumstances create inferences that are conflicting or equally consistent with either innocence or guilt, then such evidence must be resolved in favor of Defendant's innocence of having committed the crime charged.

(Appellant's Brief, 31.)

{¶ 48} Instead of utilizing appellant's requested language, the trial court instructed the jury from 2-CR 409 OJI CR 409.01, paragraph five, as follows:

> To infer or make an inference is to reach a reasonable conclusion of fact which you may but you're not required to make from other facts that you find have been established by direct evidence. Whether an inference is made rests entirely with you.

(Tr. 538.)

{¶ 49} In overruling appellant's objection to the jury instruction on inferences, the trial court explained that, if the parties agree on particular language, the parties are typically deferred to. However, when the parties disagree, the judge explained his philosophy was to defer to the Ohio Jury Instructions.

{¶ 50} Appellant contends this amounted to an abuse of discretion because Ohio law does not require deference to the Ohio Jury Instructions. The fallacy of appellant's argument is that the trial court did not find that Ohio law requires him to defer to the Ohio Jury Instructions if the parties disagree on jury instruction language. Instead, the court stated its usual preference for determining such issues. Further, appellant's own citations within his appellate brief recognize that a requested jury instruction is not required to be given verbatim, even if it consists of an accurate statement of law. Appellant's asserted proposition, that conflicting inferences must be resolved in favor of a defendant's innocence, is taken from *State v. Domer*, 1 Ohio App.2d 155, 168 (5th Dist.1964). Appellant, however, not only takes such statement out of context, but, we note that in *Domer*, the statement was made in terms of appellate review and did not concern jury instructions.

{¶ 51} Upon review of the record, we conclude the trial court did not abuse its discretion in instructing the jury on inferences as it did. Accordingly, appellant's fourth assignment of error is overruled.

D. Fifth Assignment of Error

{¶ 52} In his fifth assignment of error, appellant contends the trial court abused its discretion in denying his motion for mistrial based on the state's failure to disclose witnesses as required by Crim.R. 16.

{¶ 53} When asked on cross-examination how many officers arrived at the scene, Officer Crum testified that, in addition to him, "[t]here was probably at least five more." (Tr. 197.) Later that day, appellant made a motion for a mistrial, arguing that the state had not provided the names of the additional officers about which Officer Crum testified. In response, the prosecutor stated she had no intention of calling any of those witnesses and that she "didn't know they existed either." (Tr. 245.) Additionally, the prosecutor stated, "I'm happy to facilitate those officers if you want them. I can give them the liaison number. The state did not know they existed either. As Officer Crum testified he did not

list them in his report as well so we did not know as well." (Tr. 247.) The trial court denied appellant's motion for a mistrial.

{¶ 54} It is well-settled that the prosecution's suppression of evidence favorable to an accused violates due process where the evidence is material either to guilt or punishment, irrespective of the prosecution's good or bad faith. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Similarly, Crim.R. 16(B)(5) requires the prosecution to disclose "[a]ny evidence favorable to the defendant and material to guilt or punishment." Hence, *Brady's* holding, as well as Crim.R. 16(B)(5), places upon the prosecution a duty to disclose evidence "that is both favorable to the accused and 'material either to guilt or to punishment.' " *United States v. Bagley*, 473 U.S. 667, 676 (1985), quoting *Brady* at 87. The prosecution's duty of disclosure under *Brady* extends to favorable and material evidence that is known to the prosecution and to others acting on the prosecution's behalf in the case. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

{¶ 55} The key issue in a case where favorable evidence is alleged to have been withheld by the prosecution is whether the evidence is material. *State v. Johnston*, 39 Ohio St.3d 48, 60 (1988). " 'The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish "materiality" in the constitutional sense.' " *State v. Jackson*, 57 Ohio St.3d 29, 33 (1991), quoting *United States v. Agurs*, 427 U.S. 97, 109-10 (1976). Rather, "[e]vidence is considered material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, ¶ 23, quoting *Bagley* at 682. The touchstone of materiality is a "reasonable probability" of a different result. *Kyles* at 434. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id*. Accordingly, the rule in *Brady* is violated when the favorable evidence that was not disclosed by the prosecution "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *State v. Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837, ¶ 40, quoting *Kyles* at 435.

{¶ 56} The defense bears the burden of proving a *Brady* violation rising to the level of denial of due process. *State v. Iacona*, 93 Ohio St.3d 83, 92 (2001), citing *Jackson* at 33; *State v. Bruce*, 10th Dist. No. 07AP-355, 2008-Ohio-4370.

{¶ 57} Here, appellant has failed to demonstrate that these alleged witnesses possessed evidence that is either favorable to him or material. In accordance with *Jackson*, appellant's assertion that these officers "were *potentially* exculpatory witnesses" because they "*possibly* may have rebutted" some of Officer Crum's testimony regarding what happened at the scene does not establish "materiality" in the constitutional sense. (Emphasis added.) (Appellant's Brief, 33.)

{¶ 58} Even if the state violated Crim.R. 16, the violation would not be grounds for reversal. "Violations of Crim.R. 16 by the prosecution may result in reversible error only upon a showing that (1) the prosecution's failure to disclose was a willful violation of the rule, (2) foreknowledge of the information would have benefited the accused in preparing a defense, and (3) the accused has suffered prejudice." *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, ¶ 38, citing *State v. Joseph*, 73 Ohio St.3d 450, 458 (1995). Other than making a conclusory assertion that he has been prejudiced, appellant does not argue or direct us to any evidence in the record that the prosecution's failure to disclose was a willful violation of Crim.R. 16 and that foreknowledge of these alleged witnesses would have benefited him in preparing a defense. *State v. Mann*, 10th Dist. No. 10AP-1131, 2011-Ohio-5286, appeal not allowed, 131 Ohio St.3d 1459, 2012-Ohio-648 (because the defendant could not satisfy all three prongs of the *Jackson* test, no reversible error in the denial of a motion for mistrial based on the prosecution's alleged Crim.R. 16 violation).

{¶ 59} Based upon the foregoing reasons, we find no abuse of discretion by the trial court in denying the motion for mistrial. Accordingly, appellant's fifth assignment of error is overruled.

E. Sixth Assignment of Error

{¶ 60} In his sixth assignment of error, appellant contends even if one error alone did not rise to the level of requiring a reversal of his conviction, the trial court's cumulative errors deprived him of a fair trial.

{¶ 61} Under the doctrine of cumulative error, a conviction will be reversed where the cumulative effect of the errors committed at trial deprives the accused of the

constitutional right to a fair trial, even though each of the numerous instances of error does not individually require reversal. *State v. Garner*, 74 Ohio St.3d 49, 64 (1995), citing *State v. DeMarco*, 31 Ohio St.3d 191 (1987), paragraph two of the syllabus. Errors which are separately harmless can, when considered together, violate an accused's right to a fair trial. *State v. Madrigal*, 87 Ohio St.3d 378, 397 (2000). However, " 'errors cannot become prejudicial by sheer weight of numbers.' " *Bryan* at ¶ 211, quoting *State v. Hill*, 75 Ohio St.3d 195, 212 (1996). The doctrine of cumulative error is not applicable to cases where there has not been a finding of multiple instances of harmless error. *State v. Skerness*, 5th Dist. No. 09-CA-28, 2011-Ohio-188, ¶ 77.

{¶ 62} According to appellant, the multiple errors alleged are: (1) prosecutorial misconduct by reference to appellant's notice of alibi as raised in his first assignment of error, (2) the trial court's failure to give his requested jury instructions as asserted in his third and fourth assignments of error, and (3) the trial court's failure to grant a mistrial on the basis of alleged discovery violations as asserted in his fifth assignment of error.

{¶ 63} As stated in our discussion of appellant's third, fourth, and fifth assignments of error, we have rejected appellant's contention that any error occurred in said instances. Accordingly, the doctrine of cumulative error is inapplicable, and appellant's sixth assignment of error is overruled.

F. Second Assignment of Error

{¶ 64} In his second assignment of error, appellant contends the trial court erred in failing to hold an evidentiary hearing to determine the amount of restitution owed by appellant when he disputed the amount of restitution owed.

{¶ 65} R.C. 2929.18(A)(1) states in relevant part:

> If the court imposes restitution, at sentencing, the court shall determine the amount of restitution to be made by the offender. If the court imposes restitution, the court may base the amount of restitution it orders on an amount recommended by the victim, the offender, a presentence investigation report, estimates or receipts indicating the cost of repairing or replacing property, and other information, provided that the amount the court orders as restitution shall not exceed the amount of the economic loss suffered by the victim as a direct and proximate result of the commission of the offense. If the court decides to impose restitution, the

> court shall hold a hearing on restitution if the offender, victim, or survivor disputes the amount.

{¶ 66} The amount of restitution ordered by a trial court must bear a reasonable relationship to the loss suffered. *State v. Blay*, 10th Dist. No. 10AP-247, 2010-Ohio-4749, ¶ 7 (internal quotations omitted). An award of restitution is limited to the actual loss caused by the defendant's criminal conduct for which he [or she] was convicted, and there must be competent and credible evidence in the record from which the court may ascertain the amount of restitution to a reasonable degree of certainty. *Id*. (internal quotations omitted).

{¶ 67} In general, "An appellate court's review of the amount of restitution ordered by a trial court is governed by an abuse of discretion standard." *State v. Whiting*, 2d Dist. No. 20168, 2004-Ohio-5284, ¶ 7, citing *State v. Williams*, 34 Ohio App.3d 33, 35 (2d Dist.1986).

{¶ 68} At the sentencing hearing, the state requested restitution in the amount of $2,730. Appellant objected, stating "there was testimony at trial about some of the property. We don't know the value, we don't know how old it was. And if this Court wants to set the matter for a restitution hearing, I think it has to, but we would object to that amount. Thank you." (June 6, 2012 Tr., 7.) Thereafter, the trial court announced its sentence. The prosecutor stated the requested restitution amount was the amount contained in the police report and was comprised of the items stolen from the house. At that time, the trial court ordered restitution in the amount of $2,730 as requested.

{¶ 69} On appeal, the state argues this court should find the record herein satisfies the hearing requirement of R.C. 2919.18(A)(1). The state, however, provides no authority supporting its stated position. Contrary to the state's position, this court has stated, "R.C. 2929.18(A)(1) 'expressly provides that a trial court *shall* hold a hearing on restitution if the victim, offender, or survivor disputes the amount.' " (Emphasis sic.) *Blay* at ¶ 12, quoting *State v. Lamere*, 3d Dist. No. 1-07-11, 2007-Ohio-4930, ¶ 10. *See also State v. Aliane*, 10th Dist. No. 03AP-840, 2004-Ohio-3730, ¶ 17 (although trial court may consider a presentence investigation report when ordering restitution, because appellant and his counsel objected to the amount of restitution ordered, the court committed reversible error by failing to comply with the hearing requirements of R.C. 2929.18).

{¶ 70} In the instant case, because counsel for appellant specifically disputed the amount of restitution, the trial court was required to hold an evidentiary hearing to determine the appropriate amount and the failure to do so constituted reversible error. *Blay*; *Lamere*; *Aliane*.

{¶ 71} Accordingly, appellant's second assignment of error is sustained.

IV. CONCLUSION

{¶ 72} In conclusion, we overrule appellant's first, third, fourth, fifth, and sixth assignments of error, and we sustain appellant's second assignment of error. Consequently, we affirm in part and reverse in part the judgment of the Franklin County Court of Common Pleas, and we remand this matter to that court to conduct a hearing on restitution.

Judgment affirmed in part and reversed in part; cause remanded with instructions.

CONNOR and DORRIAN, JJ., concur.

DORRIAN, J., concurring.

{¶ 73} On the first assignment of error, I concur with the majority that, given the strength of the remaining evidence, I cannot say it is clear appellant would not have been convicted in the absence of this improper conduct. However, I would find the prosecutor's elicitation of evidence and closing argument to be improper. Considering the cumulative nature and effect, I would find to be improper: (1) the state's cross-examination of Detective Samuel, (2) the state's cross-examination of appellant, and (3) the state's closing argument regarding any duty to file a notice of alibi and lack of duty to update. Furthermore, although the judge did instruct the jury, I do not believe the judge instructed the jury specifically regarding the testimony elicited on the *timing* of when the timely filed notice of alibi was filed. On the second, third, fourth, fifth, and sixth assignments of error, I concur with the majority.
