

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 11AP-1116 (C.P.C. No. 10CR-07-4256)
Donald Moore,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	
State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 11AP-1117 (C.P.C. No. 11CR-03-1540)
Donald Moore,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

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D E C I S I O N

Rendered on August 1, 2013

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

*Thompson Steward Hall, LLP*, and *Lisa Fields Thompson*, for appellant.

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APPEALS from the Franklin County Court of Common Pleas

CONNOR, J.

{¶ 1} Defendant-appellant, Donald Moore, appeals from two judgments of conviction and sentence entered by the Franklin County Court of Common Pleas,

pursuant to a consolidated trial that yielded jury verdicts finding appellant guilty of one count of felonious assault and two counts of failure to confine a vicious dog.

{¶ 2} The charges against appellant arise from his ownership of a pit bull named Caine who bit or mauled two different victims in separate incidents on different dates. The first incident took place on October 5, 2009, in the context of an altercation between neighbors occurring in or near appellant's front yard. Caine bit Lori Velasco-Tapia, who sustained permanent facial injuries. The second incident occurred on May 9, 2010, when Caine, running loose in the vicinity of appellant's new residence in a different neighborhood, severely mauled 12-year-old Ryan Fuller, who required immediate hospitalization and surgery.

{¶ 3} The case against appellant proceeded on two separate indictments. The first set forth one count of felonious assault with a repeat violent offender specification, pursuant to R.C. 2903.11, arising from the October 5, 2009 incident involving Velasco-Tapia; one count of failure to confine a vicious dog, a violation of R.C. 955.22, also arising out of the October 5 incident; another count of failure to confine, arising from the May 9, 2010 incident involving Ryan; and various other counts dismissed prior to trial. The second indictment set forth a single count of felonious assault with a repeat violent offender specification based upon the incident involving Ryan.

{¶ 4} Prior to trial, a dispute arose between defense counsel and plaintiff-appellee, the State of Ohio ("State"), over the State's failure to provide full discovery of witness interview summaries containing potentially exculpatory information. After a hearing, the trial court continued the matter to allow the defense to attempt to locate the witness in question. The defense was ultimately unable to locate the witness, and proceeded only with the information drawn from the State's witness interview summaries.

{¶ 5} After a consolidated trial, the jury returned guilty verdicts on both counts of failure to confine a vicious dog and one count of felonious assault in the incident involving Ryan. The jury returned a verdict of not guilty of felonious assault in the incident involving Velasco-Tapia. The court sentenced appellant to 18-month terms on each of the failure to confine offenses to be served concurrently with each other, and with an 8-year term in the felonious assault case. The court added a consecutive 5-year term on the repeat violent offender specification.

{¶ 6} This court has granted appellant leave to file a delayed appeal, and he now brings the following seven assignments of error for our review:

[I.] The trial court violated Donald Moore's rights to due process and a fair trial when it entered a judgment of guilt against him, when that finding was against the manifest weight of the evidence. Fifth and Fourteenth Amendments to the United States Constitution and Section 16, Article I of the Ohio Constitution.

[II.] The trial court violated Donald Moore's rights to due process and a fair trial when it entered a judgment of guilty against him, when that finding was not supported by sufficient evidence. Fifth and Fourteenth Amendments to the United States Constitution and Section 16, Article I of the Ohio Constitution.

[III.] Donald Moore's rights to due process and a fair trial were violated due to prosecutorial misconduct. Fifth and Fourteenth Amendments to the United States Constitution and Section 16, Article I of the Ohio Constitution.

[IV.] The trial court violated Donald Moore's rights to due process, confrontation, and a fair trial and abused its discretion when it failed [to] declare a mistrial, permitted inadmissible evidence to be admitted, and prevented the defense from further cross examining a witness. Fifth, Sixth, and Fourteenth Amendments to the United States Constitution; Sections 10 and 16, Article I of the Ohio Constitution; Evid.R. 402, 403, 404, 608, 702.

[V.] The trial court violated Donald Moore's rights to due process, and erred as a matter of law, when it improperly denied Mr. Moore jail time credit. Fifth and Fourteenth Amendments to the United States Constitution and Sections 10 and 16, Article I of the Ohio Constitution.

[VI.] Donald Moore's attorney provided him with the ineffective assistance of counsel and violated his right to due process and a fair trial where defense counsel failed to timely object to the admission of inadmissible evidence. Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Sections 10 and 16, Article I of the Ohio Constitution.

[VII.] Donald Moore was denied his right to due process and a fair trial because of cumulative error. Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Sections 10 and 16, Article I of the Ohio Constitution.

{¶ 7} Appellant's first assignment of error asserts that his convictions are against the manifest weight of the evidence presented at trial. Appellant's second assignment of error asserts that his convictions are not supported by sufficient evidence. We will address these assignments of error together.

{¶ 8} The legal concepts of sufficiency of the evidence and weight of the evidence involve different determinations. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). As to sufficiency of the evidence, " 'sufficiency' is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law." *Id.*, citing *Black's Law Dictionary* 1433 (6th Ed.1990). A determination as to whether the evidence is legally sufficient to sustain a verdict is a question of law. *Id.* at 386. When we review the sufficiency of the evidence upon appeal, we construe the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus. As a result, when we review the sufficiency of the evidence, we do not on appeal reweigh the credibility of the witnesses. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶ 79.

{¶ 9} The relevant inquiry on review of the sufficiency of the evidence is whether, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis sic.) *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). A reversal based on insufficient evidence has the same effect as a not-guilty verdict because such a determination "means that no rational factfinder could have voted to convict the defendant." *Tibbs v. Florida*, 457 U.S. 31, 41 (1982).

{¶ 10} As opposed to the concept of sufficiency of the evidence, the court in *Thompkins* noted that "[w]eight 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." *Id.* at 388, quoting *Black's Law Dictionary* at 1594. As the finder of fact, the jury is in the best position to weigh the credibility of testimony by assessing the demeanor of the witness and the manner in which he testifies, his connection or relationship with the parties, and his interest, if any, in the outcome. The jury can accept all, a part or none of the testimony offered by a witness, whether it is expert opinion or eyewitness fact, whether it is merely evidential or tends to prove the ultimate fact. *State v. McGowan*, 10th Dist. No. 08AP-55, 2008-Ohio-5894, citing *State v. Antill*, 176 Ohio St. 61, 67 (1964).

{¶ 11} When a court of appeals reverses a 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 fact finder's resolution of the conflicting testimony. *Thompkins*. 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," *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983), and in instances which 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." *Id.*

{¶ 12} With respect to the convictions for failure to confine a vicious dog, appellant asserts that his girlfriend, Stephanie Shahan, was solely responsible for intentionally or negligently releasing Caine on both occasions. Appellant also argues that there was little evidence that he was the actual owner, keeper, or harbinger of Caine. With respect to the felonious assault count, appellant argues that the evidence does not establish the mens rea for this crime because there was little evidence that he "knowingly" caused physical harm to Ryan or attempted to do so by means of a deadly weapon.

{¶ 13} We will review the evidence presented at trial to support the State's case. With respect to the first incident, general testimony established that appellant, Shahan, and their two pit bulls named Caine and Chaos, lived on South Eureka Avenue in Columbus, Ohio, on October 5, 2009.

{¶ 14} Vicki Turner testified that she lived next door to appellant with her husband, mother, and four children. Her good friend Velasco-Tapia stayed with them from time to time. Despite keeping the two pit bulls, appellant and Shahan did not have a fully fenced yard. Turner testified that the dogs were habitually chained to the side fence as sole confinement. Caine was markedly more aggressive than Chaos, and in an earlier incident, Turner had observed Caine running loose outside appellant's yard. On that occasion, Caine had chased Turner's son, who was forced to jump a fence to elude the dog.

{¶ 15} Turner testified that on the day in question she, Velasco-Tapia, and Velasco-Tapia's son, Vance, were walking in front of appellant's house when Vance and appellant, who previously had been on friendly terms, began to argue. Appellant went into his house and returned to throw a bag of pretzels at Vance, and the two then physically struggled in appellant's front yard. Turner stayed on the sidewalk, but Velasco-Tapia entered the yard to intervene between Vance and appellant.

{¶ 16} Turner testified that Shahan then opened the door to the residence she shared with appellant and Caine bolted from the house. Rather than going after Vance who was engaged in a physical confrontation with appellant, the dog then attacked Velasco-Tapia and bit her, grasping and holding her face. The dog was compelled only with great difficulty to release its hold. Appellant at this point retrieved Caine and returned him to the house.

{¶ 17} Turner further testified that she thereafter accompanied Velasco-Tapia to the hospital. Turner identified photographs taken at the hospital of Velasco-Tapia's injuries. Turner testified that, as the dog exited the house, she heard appellant say "attack, attack." (Tr. 254.)

{¶ 18} Velasco-Tapia testified for the State. She corroborated Turner's testimony that at the time of the attack she was staying with Turner. She stated that she was aware of Caine's temperament because on a prior occasion she had observed appellant's dog break his chain and try and chase a passerby; appellant was able on that occasion to recapture the dog before it caused any harm.

{¶ 19} Velasco-Tapia testified that, on the day in question, she was walking with her son Vance when Vance and appellant began to fight. As she tried to intervene she was knocked to the ground. At that time, she saw Shahan open the door to their house and

release Caine. The dog ran toward her and bit her, at which time she blacked out. Velasco-Tapia identified photographs taken of her injuries and described her medical treatment, including seven stitches around her right eye and a stitch and a puncture wound on her chin. She further testified that, sometime after the attack, appellant taunted her, stating that he had managed to keep his dogs despite the attack and that he wished the dog had killed her. (Tr. 566.)

{¶ 20} Franklin County Animal Control Deputy Warden, Joseph Callison, testified that on the day of the attack upon Velasco-Tapia, he was called to the scene to assist another deputy warden. Because it was a dog bite situation, they issued a quarantine notice and ascertained that the dog lacked a license.

{¶ 21} Callison was then questioned about a later incident involving the same dog on February 23, 2010. This incident was not directly related to either of the attacks underlying the present case, but was allowed in evidence to demonstrate Caine's temperament and aggressive nature. Callison testified that when he arrived to assist another deputy warden at the scene, they found a pit bull tied to a tree with a leash. The owner of another dog testified that the pit bull had attacked his dog.

{¶ 22} Callison was then questioned about a third incident involving the same dog; this was the attack upon Ryan. On May 9, 2010, Callison was dispatched to South Powell Avenue and found an injured pit bull locked up in the backseat of a police cruiser. He and his partner transferred the bloody dog to their own vehicle, where the dog continued to bleed significantly. The dog was impounded and then euthanized. Callison identified several pictures taken of Caine after impoundment and then after euthenization. He described several stab wounds to the dog that had caused the dog's injuries at the time it was taken into custody. He also identified a photograph of Caine's teeth taken to establish a bite pattern for later identification in the dog bite case.

{¶ 23} Charles Zilich testified regarding the incident described by Callison on February 23, 2010. He stated that he was walking his own dog near his home on Wrexham Avenue when a pit bull dog came running toward him. Zilich's dog placed itself between the approaching pit bull and Zilich, whereupon the pit bull grabbed Zilich's dog by the neck and would not let go. Zilich was able to free his dog only by wrapping his own

leash around the pit bull's neck and choking it until it released. Zilich thereupon tied the pit bull to a tree, took his own injured dog home, and called animal control officials.

{¶ 24} Franklin County Animal Control Deputy Warden Heath Younkin testified that he responded to this complaint and impounded the aggressive dog. Younkin also laid a foundation in his testimony on the characteristics of pit bull dogs, and established that the dog in question was a pit bull.

{¶ 25} Franklin County animal shelter employee, Sam Goostree, described the process for dog impoundment and events related to Caine's impoundment after the February 23, 2010 incident. On this occasion, Caine was eventually claimed by appellant on March 1, 2010. Goostree testified appellant stated that he had owned the dog for more than 30 days and that appellant was required to pay a penalty for the lack of a dog license.

{¶ 26} A veterinary technician employed at the animal shelter testified to authenticate a photograph of appellant and Caine taken at the time of reclamation on March 1.

{¶ 27} Angela Fuller testified to describe the facts surrounding the attack upon her son, Ryan. She stated that she lived across the street from appellant on South Powell Avenue in May 2010. She had observed that appellant had three dogs, including two pit bulls and a boxer. On Mother's Day, May 9, 2010, her son Ryan crossed the street to his grandmother's house. Ms. Fuller heard screaming and upon looking outside saw a crowd of people surrounding a dog and child. The child was lying on the ground beneath the dog with his legs extended and visible. A crowd of onlookers were beating the dog to try and get it to release the child. She ran outside and called 911, realizing that it was her son who was the victim. She began screaming for someone to shoot the dog. She saw another neighbor, Tony Marcum, run into his house and return with a large butcher knife. He promptly stabbed the dog twice, whereupon the dog did let go of Ryan. Appellant then appeared, grabbed the dog, and pulled it into his house. Ms. Fuller testified that she clearly heard appellant urge Marcum not to stab his dog.

{¶ 28} Ryan testified that, on the day in question, he went to his grandmother's house nearby to retrieve an adapter for a new video game. As he crossed the street, he saw that Caine was outside. Ryan was afraid of Caine because Caine had previously lunged at him and tried to bite him. On such previous occasions, appellant had cautioned



Ryan not to run near Caine, even though Ryan had not been running at the time. As Ryan returned home from his grandmother's house, Caine was unrestrained and lunged at him three times. Shahan observed Ryan's behavior and yelled at him not to move. Caine then bit Ryan and retained his hold. Ryan recalled that during the entire incident appellant was present, but did not help the efforts of other onlookers to get the dog to release its bite. Appellant merely waited until the incident had ended, then grabbed his dog and ran into his own home. Ryan testified that he was immediately transported to the hospital where he stayed for approximately a day. Since the bite, he has required physical therapy and has scarring on his head, back, and neck. Ryan identified photographs of appellant, Caine, the scene, and his injuries after the bite.

{¶ 29} Marcum testified that he lived on South Powell Avenue at the time of the incident. Appellant moved into the house next door immediately before the biting incident and Marcum went over to introduce himself. They were sharing a marijuana cigarette when they heard the commotion associated with Caine's attack on Ryan. Marcum observed that the dog was locked onto Ryan's neck and shaking him. When Marcum saw that bystanders, including Ryan's father, had no success getting the dog to release its hold through prying its jaws or beating it, he ran into his own home and grabbed a large knife. He stabbed the dog, and the dog finally let go of Ryan. He did not see what happened to the dog thereafter.

{¶ 30} Columbus Police Officer Richard Criner testified that he was the first officer to arrive at the scene. He observed that Ryan, who was lethargic and pale, was in poor condition and urged paramedics to hurry. Upon arrival, Officer Criner observed that the paramedics performed a "swoop and go" with the victim. (Tr. 783.) Other officers removed Caine from the house and loaded him into an animal control vehicle. Upon interviewing appellant the next day, Officer Criner noted that appellant was unconcerned about injuries inflicted by his dog and complained only that his dog had been stabbed.

{¶ 31} Columbus Police Officer Richard Adams was another responding officer. He testified that when he arrived, the victim was being loaded into an ambulance. He located the attacking dog and secured it in his cruiser, observing that it had a large stab wound in its side and was bleeding but still appeared fully capable and somewhat aggressive.

{¶ 32} We find that the above outlined evidence supports the jury verdicts.

{¶ 33} With respect to the failure to confine charges, R.C. 955.22 imposes strict liability upon a dog owner. R.C. 955.22(D) specifically governs the obligations of keepers of "vicious" (in later versions, "dangerous") dogs, and at the time of the attacks provided as follows:

Except when a dangerous dog is lawfully engaged in hunting or training for the purpose of hunting and is accompanied by the owner, keeper, harbinger, or handler of the dog, no owner, keeper, or harbinger of a dangerous or vicious dog shall fail to do either of the following:

(1) While that dog is on the premises of the owner, keeper, or harbinger, securely confine it at all times in a locked pen that has a top, locked fenced yard, or other locked enclosure that has a top;

(2) While that dog is off the premises of the owner, keeper, or harbinger, keep that dog on a chain-link leash or tether that is not more than six feet in length and additionally do at least one of the following:

(a) Keep that dog in a locked pen;

(b) Have the leash or tether controlled by a person who is of suitable age and discretion or securely attach, [tether] \* \* \* so that the dog is adequately restrained;

(c) Muzzle that dog.

{¶ 34} R.C. 955.02(A) provides that the terms "dangerous dog" and "vicious dog" as used in the statute are defined in R.C. 955.11. At the time of the incidents in question, that statute defined a pit bull dog as a vicious dog per se, without reference to any of the prior behavioral occurrences that define "vicious dog" elsewhere in the statute for the purpose of other breeds. R.C. 955.11(A)(4)(a)(iii). The statute provided that "ownership, keeping, or harboring of such a breed of dog shall be prima-facia evidence of the ownership, keeping, or harboring of a vicious dog."

{¶ 35} There was un rebutted testimony in this case that Caine was a pit bull dog by breed. Although the statute has since been amended, under the version of R.C. 955.11(A)(4)(a)(iii) in effect at the times relevant to this case, pit bulls are vicious dogs per

se. Although the alleged attack on Velasco-Tapia took place in appellant's front yard, R.C. 955.22 provides that, even on the owner's premises, a vicious dog must be securely confined or tethered. Caine was not confined or tethered when released from the home during the altercation between appellant and Vance. Appellant described himself as Caine's owner when retrieving the dog from the animal shelter on March 1, 2010, and, thus, assumed the liabilities of an owner, keeper or harborer under the statute. *See generally State v. Chambers*, 12th Dist. No. CA2010-06-136, 2011-Ohio-1187. The jury therefore had before it sufficient evidence on each element of the charged crime of failing to confine a vicious dog, and appellant's conviction on that charge with respect to the attack on Velasco-Tapia is supported by both sufficient evidence and the manifest weight of the evidence.

{¶ 36} Turning to the failure to confine charge arising from the attack on Ryan, again the evidence supports the jury's conclusion that Caine was not restrained as required by law since he was wandering the street at the time of the attack. This conviction is also supported by sufficient evidence and not against the manifest weight of the evidence.

{¶ 37} We now consider appellant's conviction of felonious assault based upon Caine's attack on Ryan. Appellant was charged with both forms of felonious assault defined under R.C. 2903.11:

(A) No person shall knowingly do either of the following:

(1) Cause serious physical harm to another or to another's unborn;

(2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance.

{¶ 38} R.C. 2901.01(A)(5) defines "serious physical harm" as "any physical harm that involves \* \* \* some temporary, substantial in capacity" or "[a]ny physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement." R.C. 2923.11(A) defines "deadly weapon" as "any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon." In Ohio, pit bulls have been accepted as deadly

weapons in felonious assault cases, *see, e.g., State v. Williams*, 8th Dist. No. 83402, 2004-Ohio-4085, a position that is well-corroborated by the near fatal injuries suffered by Ryan in the present case.

{¶ 39} More to the point, however, the State was not obligated to prove that appellant either trained or used Caine as a deadly weapon, because in the alternative, appellant was charged with the other form of felonious assault, knowingly causing serious physical harm to Ryan. The harm to Ryan is clearly proven; the contested element, therefore, is whether appellant knowingly caused it.

{¶ 40} Under circumstances that are not clarified by the evidence, Caine ran loose in the neighborhood and viciously attacked a child. A "person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist." R.C. 2901.22(B). Appellant, as discussed above, is guilty of the crime of failure to confine a vicious animal in connection with the assault on Ryan. Given Caine's prior aggressive conduct, including multiple attacks or attempted attacks described by the witnesses, the jury could properly draw the inference that appellant must be charged with the knowledge that his conduct in allowing Caine to run loose would probably cause an attack such as that endured by Ryan. We accordingly find that the element of "knowingly" under R.C. 2903.11 is supported by sufficient evidence in this case, and the jury did not find against the manifest weight of the evidence when it convicted appellant of felonious assault.

{¶ 41} In accordance with the foregoing, appellant's first and second assignments of error are overruled.

{¶ 42} Appellant's third assignment of error claims that the State engaged in prosecutorial misconduct that deprived appellant of a fair trial. This is based upon a prosecutor's alleged non-disclosure of exculpatory information contained in a witness interview summary.

{¶ 43} Pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), the prosecution's suppression of evidence favorable to the accused violates due process where the evidence is material to either guilt or punishment, irrespective of a good or bad faith of the prosecution. *Id.* at 87. In order to establish a *Brady* violation, a defendant must

demonstrate that the prosecution failed to disclose evidence upon request, that the evidence was favorable to the defense, and that the evidence was material to appellant's guilt or innocence. A *Brady* violation may not rest upon a claim that is "purely speculative." *State v. Hanna*, 95 Ohio St.3d 285, 296 (2002). "[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips*, 455 U.S. 209, 219 (1982). Prosecutorial misconduct will therefore not give grounds for reversal of a criminal trial unless the defendant has been denied a fair trial. *State v. Maurer*, 15 Ohio St.3d 239, 266 (1984). "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." *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, ¶ 27. The accused bears the burden of proving a *Brady* violation and consequent denial of due process. *State v. Jackson*, 57 Ohio St.3d 29, 33 (1991).

{¶ 44} In the present case, the sole evidentiary import of the alleged suppressed statement was that the witness in question would have testified that, contrary to other testimony, appellant never ordered Caine to "attack" before the dog bit Velasco-Tapia. There was already conflicting testimony on this point presented at trial; more to the point, appellant was acquitted of the charge of felonious assault arising out of this incident, and therefore his encouragement of the dog has become moot. With respect to the later attack on Ryan, the absence of this testimony is without significant impact. In fact, further establishing that Caine was likely to attack persons without an order or encouragement from his owner would have weakened the defense's case.

{¶ 45} We accordingly find that, without examining the actual nature of the prosecutor's conduct in this case, there is no *Brady* violation because the evidence concerned was not "material" as defined under *Brady* and subsequent cases. Even if, *arguendo*, we assume that the witness summary was improperly withheld, this resulted in no prejudice to appellant at trial. Appellant's third assignment of error is accordingly overruled.

{¶ 46} Appellant's fourth assignment of error addresses various evidentiary and procedural rulings by the trial court.

{¶ 47} Appellant first argues that the trial court should have granted a mistrial when the defense so moved after learning of the State's alleged suppression of exculpatory evidence as discussed above in connection with appellant's third assignment of error. The grant or denial of a mistrial rests within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *State v. Sage*, 31 Ohio St.3d 173, 182 (1997). A mistrial should be granted only when a fair trial is no longer possible. *State v. Franklin*, 62 Ohio St.3d 118, 127 (1991). In the present case, the trial court allowed a six-day recess upon learning of the alleged non-disclosure of a potentially exculpatory witness. Given the nature of the purposed testimony, it was not an abuse of discretion for the trial court to allow the trial to go forward, even though the defense was not able to locate the potential witness. While the State now argues that ultimately this non-disclosure was without effect on appellant's trial since he was acquitted of the relevant charge, the trial court's decision not to grant a mistrial must, of course, be assessed upon the situation as the trial court faced it at the time it made the decision, without granting the trial court the benefit of hindsight based upon the outcome. Nonetheless, it was not an abuse of discretion on these facts for the trial court to decline to grant a mistrial.

{¶ 48} Appellant also argues that the trial court erred in certain evidentiary rulings. Again, the trial court's decision to admit or exclude evidence is left to the sound discretion of the court. *State v. Hymore*, 9 Ohio St.2d 122, 128 (1967).

{¶ 49} The first item complained of is the court's admission of evidence that Caine had fought with another dog in an unrelated incident. Appellant asserts that this is inadmissible character evidence, improper evidence of other acts, and prejudicial beyond its probative value. We find to the contrary that this testimony was admissible. Pursuant to Evid.R. 404(B), evidence of other acts, crimes, or wrongs, while not admissible to prove bad character or to show action in conformity therewith by the defendant, may be admitted to prove motive, opportunity, intent, preparation, plan or knowledge. The dog was not on trial in this case, so evidence of bad acts by the dog does not implicate Evid.R. 404(B). To the contrary, however, knowledge by appellant of the dog's prior conduct was pertinent to the mens rea of the crime with which he was charged. This evidence was properly admissible.

{¶ 50} Appellant also argues that the trial court improperly admitted, over objection, a photograph of the dog's dentition after euthanasia. Appellant argues that the apparent snarling expression of the dog served no legitimate evidentiary purpose other to inflame the jury with the apparent vicious aspect of the dog. Appellant points out that no further evidence was presented that the bite mark analysis was actually undertaken in the present case, so that the photograph purportedly taken to establish a bite pattern was without any probative value.

{¶ 51} The record reveals that, after the photograph was partially redacted at defense counsel's request, defense did not renew its objection to the photograph. Our review of the trial court's decision to admit the photograph therefore is undertaken under plain error standard. *See* Crim.R. 52(B); *State v. Worth*, 10th Dist. No. 10AP-1125, 2012-Ohio-666, ¶ 84. 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." For an error to be "plain" within the meaning of Crim.R. 52(B), it " 'must be an "obvious" defect in the trial proceedings.' " *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, ¶ 16, quoting *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002). A reviewing court notices plain error " 'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.' " *Barnes* at 27, quoting *State v. Long*, 53 Ohio St.2d 91 (1978), paragraph three of the syllabus. "The burden of demonstrating plain error is on the party asserting it." *Payne* at ¶ 17.

{¶ 52} Under this plain error standard, appellant cannot show that the outcome of the trial would clearly have been different had the photograph been excluded. In light of the fact that the victims' bite marks were demonstrated through photographic evidence, and presented by far the greater visual impact in swaying the jury, photographs of the deceased dog cannot have been said to have particular prejudicial impact.

{¶ 53} Appellant next complains that the court allowed, during the testimony of Marcum, statements that Marcum and appellant were sharing a marijuana cigarette immediately before the attack on Ryan. Appellant argues that this again constitutes inadmissible other acts evidence under Evid.R. 404(B), since smoking a marijuana cigarette is both illegal and demonstrates bad character in the form of drug abuse. In the context of this case, however, Marcum's testimony in this respect was essentially given in

passing as Marcum described his location and activities immediately before the attack. This formed the general background to his description and established Marcum's relative proximity to the dog's attack on Ryan, and his immediate, fortuitous intervention in that attack. As such, the court did not abuse its discretion because it could reasonably conclude that the immediate background was "inextricably related to the alleged criminal act." *State v. Curry*, 43 Ohio St.2d 66, 73 (1975). Although the trial court could have reasonably concluded that the jury could do without learning of appellant's use of marijuana at this time, the court could also reasonably conclude that the act circumstantially tied appellant to the charged offense and only incidentally involved uncharged crimes. *State v. Lowe*, 69 Ohio St.3d 527, 531 (1994).

{¶ 54} Moreover, the evidence of marijuana use was admitted through the testimony of Marcum, whose own decisive and possibly life saving intervention formed the final act of the State's narrative. If the jury were inclined to attribute bad character to marijuana misdemeanants, this could only have weakened the State's case by reflecting upon a principal State witness. We do not find that this testimony regarding marijuana use by appellant immediately prior to the attack by his dog gives rise to any claim of prejudice.

{¶ 55} Finally, appellant argues that the trial court improperly limited cross-examination of Callison. Appellant argues on appeal that the defense's cross-examination of Callison was unfairly limited for arbitrary reasons, noting the court's statement "this trial is taking awhile." However, appellant does not suggest what additional evidence would have been elicited by further cross-examination. (Tr. Vol. VI, 845.) Appellant therefore fails to suggest any discernable prejudice from the trial court's limitation of cross. Absent any such suggested prejudice, no further discussion of alleged error is necessary.

{¶ 56} In summary, we find that the trial court did not abuse its discretion, be it in any individual decision or in the aggregate, in its evidentiary rulings in this case. Appellant's fourth assignment of error is overruled.

{¶ 57} Appellant's fifth assignment of error asserts that the trial court erred in calculating jail-time credit and failing to award such credit for time spent while incarcerated before and during trial. The State simply responds that appellant



acknowledged that during trial he was incarcerated for an unrelated felony offense. (Tr. Vol. VII, 1109.) R.C. 2967.191 requires jail-time credit only for pre-trial time the prisoner was incarcerated arising out of the offense for which he was tried, convicted, and sentenced. *State v. Smith*, 71 Ohio App.3d 302, 304 (10th Dist.1992). Appellant has not rebutted the State's assertion that he was incarcerated pursuant to a sentence imposed in an unrelated crime. He is not entitled to jail-time credit, and appellant's fifth assignment of error is overruled.

{¶ 58} Appellant's sixth assignment of error asserts that he was denied the effective assistance of trial counsel in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution. In order to establish a claim of ineffective assistance of counsel, a defendant must first demonstrate that his trial counsel's performance was so deficient that it was unreasonable under prevailing professional norms. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). The defendant must then establish that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

{¶ 59} "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Id.* at 689, quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955). A verdict adverse to a criminal defendant is not of itself indicative that he received ineffective assistance of trial counsel. *State v. Hester*, 45 Ohio St.2d 71, 75 (1976).

{¶ 60} Appellant's arguments are entirely based upon defense counsel's failure to object to the trial court's evidentiary rulings. As we have stated and concluded in our discussion of appellant's previous assignments of error, these decisions by the trial court were either not erroneous or not prejudicial. Appellant has therefore not demonstrated

deficient performance by trial counsel and appellant's sixth assignment of error is overruled.

{¶ 61} Appellant's seventh assignment of error presents a general assertion of cumulative prejudicial error even if any of the cited errors are not prejudicial of themselves. Appellant correctly points out that cumulative errors that of themselves would not deprive the appellant of a fair trial may do so in total. *State v. DeMarco*, 31 Ohio St.3d 191 (1987). The present case, however, presents no errors to cumulate, and appellant's seventh assignment of error is accordingly overruled.

{¶ 62} In summary, appellant's seven assignments of error are overruled, and the judgments of the Franklin County Court of Common Pleas are affirmed in all respects.

*Judgments affirmed.*

BROWN and DORRIAN, JJ., concur.

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