

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- VS -	:	CASE NO. 2010-T-0095
EUGENE M. HENDERSON,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Trumbull County Court of Common Pleas, Case No. 2009 CR 00318.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Plaintiff-Appellee).

Rick L. Ferrara, 2077 East 4th Street, Second Floor, Cleveland, OH 44113 (For Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} This instant appeal is from a final judgment of the Trumbull County Court of Common Pleas. Appellant, Eugene M. Henderson, contests the propriety of his convictions on six felony charges, including two counts of aggravated murder. Each of the six offenses was based upon the role he played in a drive-by shooting at a residential home. One adult and one child died.

{¶2} In March 2009, Brittnay McCoy was renting a small one-story residence

on Wick Avenue in Warren, Ohio. Her two young children, Shaunice and Joshua, lived with her. The rental home was relatively close to the house belonging to Brittnay's parents; thus, her two younger siblings, Chelise and Lloyd, would often visit her in the evenings.

{¶3} During this time frame, Brittnay was dating Marvin Chaney. Even though Chaney spent many nights with Brittnay at the Wick Avenue residence, he also stayed a few nights at a separate home on Pearl Street in Warren. The latter place was rented by Joe Williams, who allowed other individuals to stay at the home on occasion. Among the persons who periodically stayed at the Pearl Street home was appellant and Eugene Cumberbatch.

{¶4} During the few days in which Chaney stayed at the Pearl Street residence, an incident occurred in which the sum of \$3,000 was stolen from an individual living in the home. Immediately after this incident, Chaney left the Pearl Street home and never returned. In response, appellant and Cumberbatch began to take steps to find Chaney. They were joined in this endeavor by Marquis Frank, who was a cousin to Brittnay and her siblings.

{¶5} On March 22, 2009, appellant, Cumberbatch, and Frank visited Brittnay at her parents' home on Wick Avenue. As part of their conversation, Frank asked Brittnay if she knew where Chaney was and if he had any significant money in his possession. Although Frank asked the majority of the questions, Cumberbatch inquired if she knew the group of people with whom Chaney "hung" around. In addition, appellant asked if she knew whether Chaney had any weapons. At the close of their conversation, Frank told Brittnay to let him know if she became aware of Chaney's whereabouts.

{¶6} Approximately three weeks later, on the evening of April 13, 2009, Brittnay was in her Wick Avenue residence with her two children, her sister Chelise, her brother Lloyd, and Chaney. At 9:50 p.m., Chelise was preparing to leave the residence through a side door, while Brittnay and Chaney were talking in the kitchen. The three children, including Lloyd, were playing on a sofa in the living room.

{¶7} At that time, approximately 30 gunshots were directly fired at the front of Brittnay's home. One of the gunshots came from a 9mm handgun; the remaining shots were 7.62 caliber bullets that are typically fired from an assault rifle, such as an AK-47. The majority of the 7.62 caliber bullets perforated the exterior front wall of the structure and went deep into the home, ravaging the furniture, appliances, and drywall. Forensic tests which were subsequently performed on the casings found at the scene established that all of the 7.62 caliber bullets were fired from the same rifle.

{¶8} Three of the individuals inside the residence were hit during the onslaught of bullets. Brittnay's son, Joshua, was shot in the left forearm. Although Joshua needed surgery later to repair his arm, he survived the melee. Marvin Chaney suffered a fatal wound to his left chest. Despite the fact that Chaney was able to crawl from the kitchen to a bedroom in the rear of the home, he died almost immediately after the incident. Brittnay's younger brother, Lloyd, was also fatally shot in the chest. While Lloyd was able to live through the attack itself, he died eight days later at the age of ten.

{¶9} Upon securing the entire crime scene, officers of the Warren City Police Department found 22 shell casings on Wick Avenue directly in front of Brittnay's residence. Of these, 21 were casings for the 7.62 caliber bullets; the other was a 9mm casing. In addition, the officers found on the roadway a pair of sunglasses and a cell

phone.

{¶10} Notwithstanding the evidence located at the scene, the police department did not initially have any suspects for the two murders. However, the department soon received a tip that a person named Marcus Yager had information regarding the crimes. Yager was a cousin of Marquis Frank, and a friend of both Eugene Cumberbatch and appellant. Even though Yager originally denied having any knowledge of the shootings, he eventually gave the police a detailed statement which primarily implicated appellant.

{¶11} According to Yager, it was appellant's money that Chaney had stolen at Joe Williams' Pearl Avenue residence. After that event, appellant and Yager would try to find Chaney by driving around the city in borrowed vehicles. During some of their searches, appellant and Yager would be accompanied by Frank and Cumberbatch. Furthermore, they would always carry firearms with them whenever they drove through the city.

{¶12} Regarding the events of April 13, 2009, Yager stated that, after he, appellant, and Cumberbatch met at the Pearl Avenue residence, they decided to borrow the car of a person whom appellant had known while working at a car wash. In getting into the backseat of the car, Yager brought with him a 9mm handgun, which he then gave to Cumberbatch. With appellant operating the vehicle, the three men went around the city for nearly 40 minutes until appellant decided to drive by Brittnay's home on Wick Avenue. At that time, they saw a grey vehicle parked in the driveway.

{¶13} Under Yager's version of the ensuing events, appellant immediately drove back to the Pearl Avenue residence and went into the basement of the structure while he and Cumberbatch waited in the car. A few moments later, appellant walked back to

the car carrying an AK-47, and then drove back to the general vicinity of Wick Avenue. Upon driving past Brittnay's residence once, appellant turned the car around and began to pull directly in front of that house. Before coming to a stop, appellant handed a pair of sunglasses and a cell phone to Cumberbatch, and told Cumberbatch to immediately put the gear shift into "drive" when he got back into the car. After stopping the vehicle, appellant jumped out and began shooting the AK-47 rifle directly at the front of Brittnay's home. Cumberbatch also jumped from the vehicle and fired one shot toward the home, but the 9mm handgun then jammed and he tossed it back to Yager as he returned to the vehicle.

{¶14} Finally, Yager indicated in his statement to the police that, in pulling away from Brittnay's residence, appellant asked Cumberbatch to return the cell phone to him. After patting his clothes, Cumberbatch stated that he must have dropped the cell phone and sunglasses while he was outside the car. This made appellant very upset, and he continued to rant about the cell phone once the three men returned to the Pearl Avenue residence.

{¶15} Eventually, the police officers were able to locate the car which, according to Yager, was used in the commission of the two murders. Although the original driver of the car readily admitted that he allowed appellant to borrow it on the evening of April 13, 2009, the officers did not order any tests on the vehicle because approximately ten days had elapsed since the events in question. Moreover, the officers were never able to locate the AK-47 which was allegedly used to shoot into the house. However, DNA tests performed on the cell phone established that appellant could not be excluded as a major contributor of the DNA swabbed from that object.

{¶16} Upon the completion of the police investigation in June 2009, the Trumbull County Grand Jury returned a seven-count indictment against appellant. As to each of the two casualties in the shooting, the indictment had one count of aggravated murder under R.C. 2903.01(A) and one count of murder under R.C. 2903.02(B). Regarding the injury suffered by Brittnay's son, Joshua McCoy, appellant was charged with felonious assault under R.C. 2903.11(A)(2). In addition, the indictment contained separate counts of improperly discharging a firearm at a place of habitation and possession of a firearm while under a disability. Finally, six of the seven counts also had a firearm specification under R.C. 2923.11.

{¶17} Appellant's jury trial was originally scheduled to proceed in July 2009. On three separate occasions over the ensuing eight months, appellant's counsel moved the trial court to continue the date of the trial. In each instance, the trial court granted the motion, and appellant executed a waiver of his rights to a speedy trial. His trial on the seven counts went forward in May 2010.

{¶18} Before the process of selecting the jury began, appellant asked to speak to the trial court directly in its chambers. At that time, he moved for the appointment of new trial counsel and a fourth continuance of his trial. As the basis for this request, he asserted that, even though he had made inquiries on numerous occasions, his present trial counsel had not given him a copy of discovery provided by the prosecution until two days before trial. In light of this, appellant maintained that he had been denied the opportunity to properly consider the state's proposed plea bargain because he was not afforded ample time to review the evidence against him. Upon hearing responses from defense counsel and the prosecutor, the trial court basically concluded that appellant's

present attorney was capable of providing adequate legal representation, and that the trial would go forward as scheduled.

{¶19} During the actual trial, the state relied primarily upon the testimony of Joe Williams, Marcus Yager, and Jeffrey Selepe, who was the person who “loaned” the vehicle to appellant on the evening of the incident. The state also presented expert testimony regarding the autopsies of the two murder victims and the tests performed on the evidence collected at the scene of the crimes. In response, appellant submitted the testimony of Sarah Eckles, a neighbor of Brittnay who lived approximately two-houses down on Wick Avenue. Ms. Eckles stated that, on the evening of the shooting, a young man knocked on her back door and asked to use her telephone. She further stated that this man had blood on his hands and shirt. After the night of the incident, police officers showed her photographs of individuals who were allegedly suspects for the crimes, but she was never able to identify the man who was at her back door. Finally, Ms. Eckles confirmed in her testimony that appellant was not the man she had encountered.

{¶20} At the close of the four-day trial, the jury returned a not guilty verdict on the “improperly discharging a firearm at a place of habitation” charge. The jury further found appellant not guilty on each of the firearm specifications contained under the six remaining counts. As to the main charges in the other six counts, though, appellant was found guilty. This included the two aggravated murder counts and the two murder counts.

{¶21} After conducting a separate sentencing proceeding, the trial court ordered appellant to serve two consecutive sentences of life without parole on the two counts of aggravated murder. For purposes of sentencing, the two “murder” counts were merged

into the two “aggravated murder” counts. Regarding the remaining counts of felonious assault and having a weapon while under a disability, the trial court sentenced appellant to separate terms of eight years and five years, respectively. In addition, the court held that the latter two terms would be served consecutive to each other and consecutive to the two life sentences.

{¶22} In appealing from his conviction and sentence, appellant has assigned the following as error:

{¶23} “[1.] The evidence manifestly weighed against appellant’s conviction for aggravated murder and murder, as demonstrated by the jury’s acquittal of appellant on all firearm specifications and the poor quality of evidence presented to overcome [his] presumption of innocence.

{¶24} “[2.] The state failed to produce sufficient evidence to convict [appellant] of aggravated murder and murder, having weapons under disability, and felonious assault.

{¶25} “[3.] The trial court abused its discretion when it proceeded to trial in violation of appellant’s right under the Sixth Amendment after appellant requested a continuance to review evidence he had received just two days prior.

{¶26} “[4.] Defense counsel provided ineffective assistance because it failed to provide discovery materials necessary for appellant to consider his constitutional rights, including whether to proceed to trial.

{¶27} “[5.] The trial court violated appellant’s right under Ohio law when it failed to properly apply the United States Supreme Court’s recent ruling regarding judicial fact-finding authority in *Oregon v. Ice* (2009), 555 U.S. 129, 129 S.Ct. 711.

{¶28} “[6.] Appellant was prejudiced when the jury observed him both under

unnecessarily heavy guard and shackle, and when the trial court deferred to the Sheriff's department to allow such restraints.

{¶29} “[7.] The prosecution committed misconduct because it improperly shifted the burden of proof and misstated facts during closing arguments.”

{¶30} Under his first assignment, appellant has raised two arguments pertaining to the weight of the evidence forming the basis of his four convictions for aggravated murder and murder. In his first argument, he contends that the four convictions cannot be upheld because the jury verdicts on those four charges were inherently inconsistent. In support of this point, appellant emphasizes that, even though the jury found him guilty of the shooting deaths of Marvin Chaney and Lloyd McCoy, it found him not guilty of all the underlying firearm specifications. It is appellant's position that because the primary charge in all four “murder” counts were factually interrelated to the specifications, the fact that the guilty verdicts were limited to the primary charges, without any findings against him on the accompanying specifications, demonstrates that the jury lost its way.

{¶31} In attempting to provide a legal analysis supporting his argument on this point, appellant asserts that the majority of the case law regarding conflicting jury verdicts has dealt with situations in which the conflicts have been between different counts under a single indictment. However, our review of the relevant case law shows that Ohio courts have also addressed the effect of a conflict within one count. In *State v. Perryman* (1976), 49 Ohio St.2d 14, the aggravated murder count contained a death penalty specification which essentially charged the defendant with the same act as the primary offense: i.e., purposely causing the death of another during the commission of an aggravated robbery. At trial, the jury found the defendant guilty of the basic charge

of aggravated murder, but not guilty of the death penalty specification. In upholding this “conflicting” verdict, the *Perryman* court stated in the third paragraph of its syllabus:

{¶32} “Where a jury convicts a defendant of an aggravated murder committed in the course of an aggravated robbery, and where that defendant is concurrently acquitted of a specification indicting him for identical behavior, the general verdict is not invalid.”

{¶33} In support of its holding, the *Perryman* court noted that a defendant could be convicted of felony murder under R.C. 2903.01(B) without any specification; thus, a conviction for aggravated murder was not directly dependent upon a finding of guilty on the death penalty specification. *Id.* at 26.

{¶34} This court has applied the *Perryman* holding in a case involving a firearm specification. In *State v. Edmonson* (Sept. 25, 1998), 11th Dist. No. 97-P-0067, 1998 Ohio App. LEXIS 4541, the defendant argued that his conviction for aggravated robbery could not be upheld when the jury had found him not guilty of the accompanying firearm specification. In rejecting this argument, this court first reviewed the *Perryman* analysis. Our opinion then noted:

{¶35} “Another case on point is *State v. Woodson* (1985), 24 Ohio App.3d 143, ***. In *Woodson*, the defendant was also charged in a single count indictment with aggravated robbery and a firearm specification. Like the case at bar, the jury found the defendant in *Woodson* guilty of the principal charge and not guilty of the firearm specification. In upholding the conviction, the Tenth District Court of Appeals relied heavily on United States Supreme Court decisions which acknowledged that although the jury may have properly reached its conclusions on a compound offense, mistake,

compromise or leniency may have caused it to reach an inconsistent conclusion on the lesser offense. However, individualized assessment of the reasons for such inconsistency would be based on pure speculation or would require the court to make forbidden inquiries into jury deliberations. *Woodson* at 144, citing *Dunn v. United States* (1932), 284 U.S. 390, *** and *United States v. Powell* (1984), 469 U.S. 57, ***.” *Id.* at *12-13.

{¶36} Pursuant to the foregoing precedent, it cannot simply be assumed that the jury lost its way in rendering conflicting verdicts, and that any “error” was harmful to the defendant. Instead, it is also possible that the conflicting verdicts occurred as a result of a compromise or a sense of leniency. Given that it can never be properly determined if the conflicting verdicts actually benefitted the defendant, the conviction on the primary charge is always upheld. See, also, *State v. Kiser*, 6th Dist. No. S-03-028, 2005-Ohio-2491. For this reason, the fact that the jury in the instant case found appellant not guilty of the accompanying firearm specifications is not technically sufficient, in and of itself, to reverse the four convictions for aggravated murder and murder.

{¶37} Under the second aspect of his first assignment, appellant maintains that his convictions on the four “murder” charges were against the manifest weight because the state failed to present any credible evidence concerning two important points. First, he submits that the testimony of Marcus Yager regarding the motive for the shootings was not believable. Second, appellant contends that the state’s physical evidence was inadequate to establish that he was present at the scene of the crime or fired the rifle in question.

{¶38} As to the issue of motive, appellant states that the only credible testimony

on this point was that of Brittney McCoy, who indicated that Marquis Frank told her that it was his money which Marvin Cheney had stolen at the Pearl Avenue home. Appellant further states that, although Yager testified that Chaney had actually taken appellant's money, his testimony was not believable because it was the product of a plea bargain in which the state had drastically reduced the charges against Yager. Based upon this, it is appellant's position that he had no motive to want to shoot Chaney.

{¶39} In relation to this point, this court would note that a review of the transcript of the trial readily demonstrates that Yager was not the only witness who stated that the money in question had been stolen from appellant. Joe Williams, the primary tenant at the Pearl Avenue residence, expressly testified that appellant told him that he had been robbed of \$3,000 by Chaney. On this testimony alone, the jury could have found that it was only appellant who held a grudge against Chaney.

{¶40} Furthermore, the trial transcript does not support appellant's assertion that Yager's testimony was completely lacking in credibility. During his direct examination, Yager fully explained the nature of the "deal" he had received from the state; therefore, the jury had the opportunity to fully consider this point in assessing his credibility. Our review of the transcript that Yager's testimony did not have any major inconsistencies which would have rendered his basic description of appellant's actions untenable.

{¶41} As part of his challenge to Yager's credibility, appellant emphasizes that he could not provide any explanation as to what happened to the AK-47 after the three men returned to the Pearl Avenue residence. However, in light of the fact that the rifle had just been employed to pulverize a house, the jury could have readily found that it was logical that the rifle would not be simply returned to the basement of that residence.

Moreover, Yager testified that he and appellant went their own separate ways for a time period after the shooting; hence, the jury could have concluded that Yager's lack of explanation regarding the gun's whereabouts to be of no consequence.

{¶42} In considering prior "manifest weight" arguments, this court has stated that a certain degree of deference must be shown to a jury's judgment of credibility because it is in the best position to make that particular assessment. *State v. Lewis*, 11th Dist. No. 2009-L-138, 2010-Ohio-4288, at ¶87. In light of the foregoing discussion, we hold that appellant has failed to demonstrate that Yager's testimony was so incredible that a reasonable juror could not find it believable.

{¶43} Concerning the quality of the state's forensic evidence, appellant submits that the state was not even able to prove that he was the only person to have touched the cell phone that was found in the street. He also notes that the state did not conduct any forensic tests on certain items, including the borrowed car.

{¶44} As to this point, it must be noted that appellant's entire contention on the physical evidence hinges upon the jury's total rejection of Yager's testimony. That is, if believed, his testimony alone constituted some evidence upon which the jury could find that appellant was not only at the scene of the crime, but was the person who fired the AK-47 into the home with the intent of killing Chaney. Given our conclusion regarding the credibility of Yager's testimony, it follows that the quality of the physical evidence in the state's case was not dispositive.

{¶45} In deciding whether the verdict in a criminal matter is against the manifest weight of the evidence, an appellate court must weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and then determine if the jury lost

its way and caused a manifest miscarriage of justice. *State v. Legg*, 11th Dist No. 2009-T-0111, 2010-Ohio-5399, at ¶47. Consistent with the foregoing legal analysis, this court holds that the record before us demonstrates that the jury did not lose its way in regard to the two counts of aggravated murder and two counts of murder. Given that Yager's testimony concerning the events in question was generally in line with the remainder of the state's case, the jury could reasonably find his description of the murders credible. Thus, as appellant's convictions on those offenses were not against the manifest weight of the evidence, both aspects of his first assignment are without merit.

{¶46} Under his second assignment, appellant argues that the state's evidence was legally insufficient to warrant his conviction on any of the six particular offenses of which he was found guilty. As he did under the foregoing assignment, appellant again focuses his analysis upon the credibility of Marcus Yager's testimony. Essentially, he contends that, if Yager's testimony is excluded from consideration, the remainder of the state's evidence was too weak to establish that he shot the rifle and caused the injuries to the three victims.

{¶47} In relation to the separate issue of the sufficiency of the state's evidence in a criminal trial, this court has indicated:

{¶48} ““(***) The test (for sufficiency of the evidence) is whether after viewing the probative evidence and the inference drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all of the elements of the offense beyond a reasonable doubt. *The claim of insufficient evidence invokes an inquiry about due process. It raises a question of law, the resolution of which does not allow the court to weigh the evidence.* ***”

{¶49} “In other words, the standard to be applied on a question concerning sufficiency is: when viewing the evidence ‘in a light most favorable to the prosecution,’ *** ‘(a) reviewing court (should) not reverse a jury verdict where there is substantial evidence upon which the jury could reasonably conclude that all of the elements of an offense have been proven beyond a reasonable doubt.’ ****” (Emphasis sic.) (Citations omitted.) *State v. Schlee* (Dec. 23, 1994), 11th Dist. No. 93-L-082, 1994 Ohio App. LEXIS 5862, at *13-14.

{¶50} Under a “sufficiency” analysis, questions of weight and credibility are not considered because the sole issue is whether the state presented some evidence as to each element in the charged offenses. Therefore, this court must include the testimony of Marcus Yager in deciding if the evidence in the present case met the cited standard. Furthermore, as was discussed under the first assignment, Yager’s testimony showed that appellant had possession of the AK-47 when he pulled in front of Brittnay McCoy’s home, and that he then aimed it at the residence and fired it at least 25 to 30 times. In addition, the remainder of the state’s evidence demonstrated that, as a result of the shots from the AK-47, two persons died and a third was seriously wounded.

{¶51} Taken as a whole, the trial transcript establishes that the state presented considerable evidence upon which a juror could readily find beyond a reasonable doubt that each element under the six remaining charges had been proven. Thus, since the evidence of the state was legally sufficient, appellant’s second assignment of error does not have merit.

{¶52} Appellant’s next two assignments of error are related, and accordingly will be addressed simultaneously. As was noted above, before the voir dire process could

begin on the first day of his trial, appellant made an oral pro se motion to continue the matter on the basis that he had not been afforded ample time to review discovery provided by the state. Appellant informed the trial court that his trial counsel had only given him a copy of discovery two days earlier, and that he needed more time to review it so that he could decide whether to accept the state's prior plea offer. After hearing separate arguments from counsel on both sides, the trial court ordered that the trial would proceed, and also denied appellant's request for the appointment of new trial counsel. Under his third assignment of this appeal, appellant asserts that the trial court erred in not granting the continuance under the circumstances of this case. Under the fourth assignment, he maintains that he was denied effective assistance of counsel as a result of the delay in providing a copy of discovery.

{¶53} Our review of the trial record readily shows that the underlying action had been pending for approximately 11 months when appellant made his pro se motion, and that he and his primary trial counsel had already been granted three continuances in the matter. Furthermore, there does not appear to be any dispute that the state gave defense counsel full discovery at a very early stage of the proceeding. As part of their discussion before the trial court, the prosecutor and defense counsel agreed that "open-file" discovery had been employed in this instance.

{¶54} Nevertheless, there is nothing in the record indicating exactly when appellant was given the discovery materials by his trial counsel. In addressing the merits of the pro se motion, defense counsel stated that he thought he had done so earlier in the action, but that he could only confirm that he had given appellant a copy immediately when the request was made the week before the fourth trial date.

{¶55} In responding to appellant's third and fourth assignments, the state argues that, even if appellant was not actually given access to discovery until four days before trial, that still gave him sufficient time in which to review the materials and decide if he wanted to accept a plea bargain.

{¶56} In addressing this issue, this court would first note that, despite the fact that the trial transcript contains references to a proposed plea bargain, the record does not contain a complete statement of the terms of the state's offer. Second, a review of the record shows that it does not contain a complete copy of the discovery materials that were given to defense counsel; thus, we cannot determine what specific information was provided to appellant. Third, the record contains nothing as to the nature of the discussions, if any, between appellant and his trial counsel as to the merits of the plea bargain and whether it should be accepted in light of the discovery provided. Stated otherwise, in relation to the latter point, the record does not disclose whether trial counsel provided appellant with a verbal summary of the evidence against him. Moreover, the volume of the written discovery is unknown.

{¶57} In the absence of the foregoing items, a proper determination cannot be made concerning whether appellant's final decision on the plea bargain would have been different, or whether he had sufficient time to review the documents when he received them. As to this point, this court would reiterate that appellant has not argued that the trial counsel's delay in providing discovery had an effect upon his trial strategy. Instead, he only contends that it could have altered his decision on the plea bargain.

{¶58} To prevail on a claim of ineffective assistance of trial counsel, a defendant has the burden of establishing, inter alia, that the deficiencies in counsel's performance

were prejudicial to him. *State v. Burdette*, 11th Dist. No. 2009-A-0021, 2009-Ohio-5633, at ¶66. Under this requirement, it must be shown that there is a reasonable probability that the outcome of the trial would have been different if not for counsel's errors. *Id.* at ¶69.

{¶59} In our case, appellant is unable to carry this burden because the record does not contain sufficient information to demonstrate that appellant would have chosen not to go forward with the trial if he had received a copy of discovery sooner. For this reason, his claim of ineffective assistance of trial counsel cannot succeed on direct appeal. Rather, it must be brought by way of postconviction relief, due to the numerous matters outside the record necessary to a decision.

{¶60} Appellant also contends that the trial court erred in overruling his continuance request. As a general proposition, the decision to grant or deny a continuance in a criminal proceeding lies within the sound discretion of the trial court. *State v. Griesmar*, 11th Dist. No. 2009-L-061, 2010-Ohio-824, at ¶17. Factors to be considered in ruling upon a continuance request include, but are not limited to, the number of prior continuances, the inconvenience to the witnesses, opposing counsel, and the court itself, the reasons for the continuance request, the length of the delay requested, and whether the defendant contributed to the situation that created the need for the request. *Id.* at ¶18.

{¶61} The sole basis for the continuance request was so that appellant could review the discovery materials, that he acknowledged he received at the very least a few days before his trial, in order for him to decide whether to take the plea offer. For the reasons stated in our discussion concerning appellant's claim of ineffective

assistance of trial counsel, the record is silent on too many issues to demonstrate an abuse of discretion as to the denial of the continuance request. Moreover, appellant had already been granted three prior continuances, and the state had made considerable effort to have its expert witnesses present and available to testify.

{¶62} In light of the foregoing, appellant has failed to demonstrate that the trial court abused its discretion in denying his fourth request for a continuance of his trial. Accordingly, both the third and fourth assignments do not have merit.

{¶63} Under his fifth assignment, appellant submits that the trial court failed to employ the proper procedure for imposing consecutive terms of imprisonment for the six convictions. Specifically, he maintains that the court erred in not expressly stating on the record its judicial findings that justified its order to impose consecutive terms. While acknowledging that the Supreme Court of Ohio previously declared unconstitutional the “findings of fact” provisions in R.C. Chapter 2929, appellant contends that the statutes in question must again be followed in light of the United States Supreme Court’s ruling in *Oregon v. Ice* (2009), 555 U.S. 160.

{¶64} Following the filing of appellant’s brief in this appeal, the Supreme Court of Ohio was presented with an opportunity to review the identical argument. In *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, the defendant asserted that the *Ice* decision mandates that a trial court cannot impose consecutive sentences unless it has made specific findings of fact under R.C. 2929.14(E)(4). In rejecting this assertion, the *Hodge* court stated:

{¶65} “2. The United States Supreme Court’s decision in *Oregon v. Ice* (2009), 555 U.S. 160 ***, does not revive Ohio’s former consecutive-sentencing statutory

provisions, R.C. 2929.14(E)(4) and 2929.41(A), which were held unconstitutional in *State v. Foster*, 109 Ohio St.3d 1, 2006 Ohio 856, ***.

{¶66} “3. Trial court judges are not obligated to engage in judicial fact-finding prior to imposing consecutive sentences unless the General Assembly enacts new legislation requiring that findings be made.” *Id.*, paragraphs two and three of the syllabus.

{¶67} In light of the holding in *Hodge*, it has been stated that the basic procedure for the imposition of a sentence in a felony matter is still the same as it was prior to the release of the *Ice* decision; i.e., Ohio trial courts have broad discretion in determining the length of a prison term within the delineated statutory range, and are not required to provide findings of facts in support of decisions to impose a maximum, consecutive, or greater than the minimum prison term. *State v. Cole*, 8th Dist. No. 94911, 2011-Ohio-2146, at ¶7, citing *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, at ¶11.

{¶68} Consequently, the trial court in the underlying action had no obligation to make findings of fact or cite any statutory presumption while ordering that the imposed prison terms must be served consecutively. For this reason, appellant’s fifth assignment of error lacks merit.

{¶69} Under his sixth assignment, appellant argues that he was denied his right to a fair trial because the jury was permitted to see him while he was subject to serious physical restraint while in the custody of the deputy sheriffs. In support of this assertion, appellant cites two incidents. In the first, potential jurors may have viewed him when he was walked across a street to the courthouse while in shackles. In the second, seated members of the jury were allowed to see him being escorted into the courtroom

unshackled by four deputies.

{¶70} In relation to the first incident, it must be noted that a criminal defendant is entitled to participate in a jury trial without being restrained by shackles, unless unusual circumstances exist. *State v. Kidder* (1987), 32 Ohio St.3d 279, 285-286. However, the *Kidder* court also held that a defendant is not denied a fair trial simply because the jury may momentarily see him in shackles; i.e., if the view of the shackled defendant is brief, inadvertent and outside of the courtroom, any error will be deemed harmless because the danger of prejudice is slight. *Id.* In other words, a brief, inadvertent sighting of the defendant in shackles will not result in a due process violation unless actual prejudice can be shown. *State v. West*, 6th Dist. No. WD-07-002, 2008-Ohio-368, at ¶39.

{¶71} In the instant case, appellant's primary trial counsel gave a description of the "shackled" incident on the record. According to counsel, appellant was only seen in shackles as he was being led from the street into the courthouse; hence, the incident was short in duration. More importantly, the record shows that this incident took place before the voir dire process even began. Thus, while it may have been possible that he was seen by a potential juror, there is nothing in the record indicating that one of those persons were actually seated on the jury. In addition, even if the ultimate jury did have one of the persons who saw appellant in shackles, there is nothing in the record to show that the incident deprived the juror of the ability to be impartial. To this extent, appellant is unable to demonstrate that he was actually prejudiced by the inadvertent incident.

{¶72} As to the second incident in which four sheriff deputies escorted appellant into the courtroom in view of the jury, a review of the transcript indicates that this type of procedure was only used once, immediately prior to opening arguments. After defense

counsel objected to it, a new procedure was agreed to, under which the deputies would seat appellant in the courtroom before the jury was allowed to re-enter. Following this change in procedure, defense counsel did not assert any new objection throughout the remainder of the trial, despite the fact that the deputies were still used in the courtroom to provide general security.

{¶73} In light of the foregoing facts, it is readily apparent that there was only one instance during the trial in which the sheriff deputies treated appellant in such a manner that it could have been inferred that he posed an immediate threat to other individuals in the courtroom. Throughout the rest of the trial, appellant was treated in the same way as any other criminal defendant before the jury. Under such circumstances, even if it is assumed that the use of the four deputies in the one instance raised the specter of an imminent threat, any potential prejudicial effect was ameliorated by the employment of the “normal” procedure in the remainder of the proceeding. Thus, since the record does not show that appellant was denied his basic right to a fair trial, his sixth assignment is without merit.

{¶74} Under his final assignment, appellant contends that he is entitled to a new trial because the prosecution engaged in certain acts of misconduct as part of its closing argument. In the first part of this assignment, appellant claims that the prosecutor made three statements that invited the jury to switch the burden of proof from the state to the defense.

{¶75} A review of the trial transcript confirms that, on three separate occasions during closing arguments, the prosecutor attempted to address the question of whether it had been shown that appellant had been present at the scene of the crimes. In doing

so, the prosecutor asked the jury to consider whether there had been any evidence that showed appellant was not at the Wick Avenue location. For example, at one juncture of his argument, the prosecutor asserted:

{¶76} “Was the Defendant there? Again, ask yourself, who said he wasn’t there? What physical evidence shows he wasn’t there? None.”

{¶77} In considering comments similar to the foregoing, the Supreme Court of Ohio has concluded that such statements do not inappropriately encourage the shifting of the ultimate burden of proof. In *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, the prosecutor’s closing argument included the following query: “‘Why didn’t [the defense] present any witnesses?’” In holding that this query was acceptable, the court indicated that the state is allowed to reference the fact that the defense had not offered any evidence in support of its case. *Id.* at ¶293.

{¶78} In each of the three disputed statements in this case, the prosecutor was only trying to point out to the jury that there was no conflicting evidence as to whether he had been present when the crimes occurred. Since such a statement is permissible under *McKnight*, the first aspect of the seventh assignment has no merit.

{¶79} Under the second aspect of his “misconduct” argument, appellant submits that his right to a fair trial was prejudiced because the prosecutor misstated the nature of the evidence on four occasions during closing arguments. As to the first of the four statements referenced by appellant, a review of the trial transcript readily confirms that the prosecutor’s statement was consistent with the testimony. According to appellant, the prosecutor quoted Jeff Selep as testifying that he actually saw appellant drive away in his vehicle on the night of the incident. But the transcript readily establishes that the

prosecutor never attributed that quote to Selep; instead, the prosecutor only stated that appellant, “in fact, did borrow Jeff Selep’s car.” Furthermore, separate testimony at trial showed that appellant, Cumberbatch, and Frank took Selep’s vehicle when they initially left the Peal Avenue residence.

{¶80} In relation to the remaining three statements, our review does indicate that the prosecutor did misquote some aspects of the trial testimony. However, each of the misstatements was so slight that it cannot be said that the prosecutor engaged in any misconduct, or that the misstatements adversely affected the outcome of the proceeding.

{¶81} First, appellant correctly notes that, in describing a prior incident in which appellant, Frank, and other individuals had spoken to Brittnay McCoy at her residence, the prosecutor stated that appellant had asked McCoy whether she knew where Marvin Chaney was “staying.” In actuality, the trial testimony demonstrates that appellant only asked whether McCoy knew if Chaney had any guns, and that it had been Franks who had inquired as to where Chaney was staying. Given the context of the earlier incident, though, the distinction between the two questions had little significance. The important point was that the dispute about the stolen money was so crucial to appellant that he was present for the conversation and participated in it.

{¶82} Second, the prosecutor also made a misstatement regarding the argument that ensued after appellant, Cumberbatch, and Frank had returned to the Pearl Avenue residence following the shooting. The prosecutor told the jury that Joe Williams, Marcus Yager, and Jeff Selep had all testified that appellant was seen shouting at Cumberbatch for dropping the cell phone. In actuality, only Williams and Yager expressly testified that

appellant was yelling directly at Cumberbatch; Selep was equivocal as to whether it was Cumberbatch or Frank who was the subject of appellant's tirade. As to this inconsistency, this court would emphasize that the most crucial aspect of the disputed testimony was the fact that it was appellant who was upset by the loss of the cell phone at the scene. Given that two witnesses did indicate that Cumberbatch was the subject of appellant's rage, it cannot be said that the prosecutor's slight misstatement constituted a serious misrepresentation of the state of the evidence.

{¶83} Finally, the prosecutor did misquote Joe Williams as testifying that he saw appellant carrying the AK-47 from the basement of the Pearl Avenue residence. In actuality, Williams only testified that he saw appellant and Cumberbatch go into the basement and retrieve the rifle. Nevertheless, the key point of Williams' testimony was that appellant had been involved in taking the rifle from the basement to the car. Thus, even though the prosecutor's statement was technically incorrect, the degree of the misstatement was not such that it had the effect of undermining the ability of the jury to make proper factual findings based upon submitted evidence.

{¶84} As discussed, any misstatement were minor, not misleading as to the overall state of the evidence, and, therefore do not constitute misconduct.

{¶85} Moreover, even if it is shown that a prosecutor's statement to the jury were improper, a finding of prosecutorial misconduct can still only be made when the record indicates that the substantial rights of the defendant were prejudicially affected. *State v. Klapka*, 11th Dist. No. 2003-L-044, 2004-Ohio-2921, at ¶41. Upon reviewing the entire record in this matter, this court holds that appellant cannot satisfy the test for prosecutorial misconduct; i.e., the record does not support the conclusion that the three

minor misstatements by the prosecutor adversely affected the outcome of the trial. Therefore, appellant's seventh assignment is not well-taken.

{¶86} Consistent with the foregoing disposition of the seven assignments of error, it is the order of this court that the judgment of the trial court is affirmed.

DIANE V. GRENDELL, J.,

MARY JANE TRAPP, J.,

concur.