[Cite as *State v. Burton*, 2017-Ohio-322.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HIGHLAND COUNTY

STATE OF OHIO,	:	
	:	Case No. 16CA6
Plaintiff-Appellee,	:	
	:	
vs.	:	DECISION AND JUDGMENT
	:	ENTRY
RYAN BURTON,	:	
	:	
Defendant-Appellant.	:	**Released: 01/11/17**

APPEARANCES:

Kathryn Hapner, Hillsboro, Ohio, for Appellant.

Anneka P. Collins, Highland County Prosecutor, Hillsboro, Ohio, for Appellee.

McFarland, J.

{¶1} Ryan Burton appeals from his conviction for one count of illegal manufacture of methamphetamine, as well as the trial court's ruling on his pre-trial motion to suppress. On appeal, Appellant contends that 1) the trial court erred in overruling his motion to suppress; 2) the trial court erred in admitting out-of-court statements; 3) the trial court erred by denying his motion to dismiss; and 4) the trial court erred by denying his motion for mistrial after the prosecutor's impermissible and false statement regarding his confession.

{¶2} Because we conclude Appellant lacked standing to challenge the search of the residence at issue, we cannot conclude that the trial court erred in denying his motion to suppress. Thus, Appellant's first assignment of error is overruled. Although we determined under Appellant's second assignment of error that the trial court's admission of an out-of-court statement made by the owner of the residence at issue violated Appellants' constitutional confrontation rights, we also determined that such error was harmless beyond a reasonable doubt. As such, Appellant's second assignment of error is overruled.

{¶3} In light of our disposition of Appellant's second assignment of error, which determined the trial court's violation of Appellant's constitutional confrontation right was harmless beyond a reasonable doubt, we cannot conclude that the trial court's denial of Appellant's motion to dismiss, which was based upon the same argument, was in error. Therefore, Appellant's third assignment of error is overruled. Finally, because we find that the trial court did not abuse its discretion in denying Appellant's motion for a mistrial, Appellant's fourth and final assignment of error is overruled. Accordingly, having found no merit in the assignments of error raised by Appellant, the decision of the trial court is affirmed.

FACTS

{¶4} A review of the record reveals that on May 9, 2015, Appellant and his girlfriend arrived at Ernie Haskell's apartment, which was located in Hillsboro, Ohio. Appellant and his girlfriend were at the apartment with Haskell's permission, arrived at approximately 2:30 a.m., and planned to stay a few hours until Appellant's father sobered up and could pick them up. After arriving at the apartment at 2:30 a.m., Appellant subsequently left with Haskell to go get something to eat at approximately 4:00 a.m. Appellant and Haskell then returned to the apartment and Haskell again left shortly thereafter. Appellant informed Haskell when he left that he was leaving as soon as his father showed up.

{¶5} Upon leaving, Haskell spoke with Officer Brian Butler of the Hillsboro Police Department. Officer Butler then went to Haskell's apartment, without Haskell, where outside the apartment he noticed a very strong chemical odor which, in his experience, indicated the manufacture of methamphetamine. Officer Butler then knocked on the door and when Appellant's girlfriend opened the door, Butler observed a much stronger chemical odor and also saw Appellant run into the bathroom of the apartment. Officer Butler then entered the apartment, ordered both Appellant and his girlfriend out of the apartment, and located an active one-

pot meth lab in the bathroom. It appears from the record Officer Butler testified that upon initial questioning Appellant repeatedly denied possession of the one-pot, but then admitted that it was his. Appellant did not provide a written or recorded statement to Officer Butler.

{¶6} Appellant was subsequently indicted for one count of illegal manufacture of methamphetamine. Appellant moved to suppress the results of the search. The trial court determined Appellant lacked standing to challenge the search because he neither owned the residence at issue nor was an overnight guest, and denied Appellant's motion. The matter eventually proceeded to a jury trial. Officer Butler testified on behalf of the State, as well as a representative from the Ohio Bureau of Criminal Identification and Investigation (BCI), with respect to the confirmation that the one-pot recovered from the apartment did, in fact, contain methamphetamine.

{¶7} At the close of the State's case, for reasons which will be more fully discussed herein, Appellant made an oral motion to dismiss the case, and also moved for a mistrial. The trial court denied the motions, but did provide certain limiting instructions in response to Appellant's concerns. Appellant then rested without presenting any evidence. Appellant was ultimately convicted as charged in the indictment for one count of illegal

manufacture of methamphetamine. Appellant now brings his timely appeal, setting forth four assignments of error for our review.

ASSIGNMENTS OF ERROR

"I. THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS.

II. THE TRIAL COURT ERRED IN ADMITTING OUT-OF-COURT STATEMENTS IN VIOLATION OF RYAN BURTON'S RIGHT OF CONFRONTATION PURSUANT TO OHIO RULES OF EVIDENCE 801(C) AND 802, THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AND SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION.

III. THE TRIAL COURT ERRED BY DENYING DEFENDANT/APPELLANT'S MOTION TO DISMISS FOR VIOLATION OF HIS RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

IV. THE TRIAL COURT ERRED BY DENYING DEFENDANT'S MOTION FOR MISTRIAL AFTER THE PROSECUTOR'S IMPERMISSIBLE AND FALSE STATEMENTS REGARDING DEFENDANT'S CONFESSION."

ASSIGNMENT OF ERROR I

{¶8} In his first assignment of error, Appellant contends the trial court erred in overruling his motion to suppress. Specifically, Appellant contends that the trial court erred in its determination that he did not have standing to challenge the search of the residence, based upon its reasoning that Appellant did not own the residence at issue and was not an overnight guest. The State disagrees, arguing that Appellant only intended to stay at the

apartment for two hours and had no intent to spend the night. The State alternatively argues that should this Court find Appellant had standing to challenge the search, the search was still valid because the owner of the apartment gave implied consent to search, and an exigent circumstances exception to the warrant requirement existed.

{¶9} Appellate review of a trial court's decision on a motion to suppress raises a mixed question of law and fact. *State v. Hobbs*, 133 Ohio St.3d 43, 2012–Ohio–3886, 975 N.E.2d 965, ¶ 6. Because the trial court acts as the trier of fact in suppression hearings and is in the best position to resolve factual issues and evaluate the credibility of witnesses, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Burnside*, 100 Ohio St.3d 152, 2003–Ohio–5372, 797 N.E.2d 71, ¶ 8. Accepting these facts as true, we must then "independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard." *Hobbs* at ¶ 8, citing *Burnside* at ¶ 8.

{¶10} "The Fourth Amendment to the United States Constitution and the Ohio Constitution, Article I, Section 14, prohibit unreasonable searches and seizures." *State v. Emerson*, 134 Ohio St.3d 191, 2012–Ohio–5047, 981 N.E.2d 787, ¶ 15. This constitutional guarantee is protected by the

exclusionary rule, which mandates exclusion of the evidence obtained from the unreasonable search and seizure at trial. *Id*. "Fourth Amendment rights are personal in nature and may not be vicariously asserted by others." *State v. Horsley*, 4th Dist. Scioto No. 12CA3473, 2013–Ohio–901, ¶ 12; citing *Rakas v. Illinois*, 439 U.S. 128, 133–134, 99 S.Ct. 421(1978). " 'The rule followed by courts today with regard to standing is whether the defendant had an expectation of privacy * * * that society is prepared to recognize as reasonable.' " *State v. Dixon*, 4th Dist. Scioto No. 11CA3413, 2012–Ohio–4689, ¶ 16; quoting *State v. Williams*, 73 Ohio St.3d 153, 166, 652 N.E.2d 721 (1995).

{¶11} It is well settled that " '[a] person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed.' " *Horsley* at ¶ 12; quoting *Rakas* at 134. Nevertheless, a defendant's status as an overnight guest at the time of the search is sufficient to show that he had a reasonable expectation of privacy in his host's home. *Minnesota v. Olson*, 495 U.S. 91, 96–97, 110 S.Ct. 1684 (1990).

{¶12} "The defendant bears the burden of demonstrating that he possessed 'a legitimate expectation of privacy' in the place searched or the

item seized." *Horsley* at ¶ 13; citing *State v. Dennis,* 79 Ohio St.3d 421, 426, 683 N.E.2d 1096 (1997). Consequently, the burden is on the defendant to establish standing. *Dixon* at ¶ 16; quoting *Williams* at 166; Katz, Baldwin's Ohio Arrest, Search and Seizure, Section 27:3 (2015) ("before a court may review the reasonableness of police behavior, the defendant must be able to demonstrate that his Fourth Amendment right to privacy was violated. A defendant has the burden of proving standing").

{¶13} Appellant argues on appeal that he had the status of an overnight guest in Haskell's apartment because he arrived at 2:30 a.m., took a nap, and was still there when law enforcement arrived at 5:55 a.m. However, during the suppression hearing, Appellant testified that he only intended to stay at the residence in question "[j]ust a few hours, until [his] father was able to sober up and come and pick [him] up." He further testified that he left and went to Speedway to get something to eat and drink at 4:00 a.m., then went back to Haskell's residence to take a nap. He testified that when Haskell left the apartment a little while later, he told Haskell "When my dad gets here, whether you're here or not, I'm leaving."

{¶14} Based upon our review of the record, there was no evidence introduced at the suppression hearing to indicate that Appellant owned the residence in question or was an overnight guest in Haskell's residence, which

would support his claim that he had standing to assert a challenge to the search. *See State v. Dixon*, 4th Dist. Scioto No. 11CA3413, 2012–Ohio–4689, ¶ 17; citing *Minnesota v. Olson, supra*; *State v. Corbin*, 194 Ohio App.3d 720, 2011–Ohio–3491, 957 N.E.2d 849, ¶ 26 (courts look at the totality of the circumstances when making an overnight guest determination, including defendant's intent to remain at the residence, whether defendant had a key to the residence, whether defendant had personal effects at the residence and specifically, even for on and off again guests, whether defendant had a specific intent to spend the night on the night in question) (internal citations omitted). Thus, we cannot conclude that the trial court erred in determining Appellant lacked standing to assert a challenge to the search. Accordingly, we find no merit to Appellant's first assignment of error and it is overruled.

ASSIGNMENT OF ERROR II

{¶15} In his second assignment of error, Appellant contends that the trial court erred in admitting out-of-court statements in violation of his constitutional right of confrontation. Specifically, Appellant contends that the trial court erred and abused its discretion in allowing the arresting officer to testify to hearsay evidence from the owner of the residence in question, Ernie Haskell, that Appellant was cooking meth at his apartment, and also

erred in ruling that the statement was not admitted for the truth of the matter asserted. The State argues that the statement at issue was not offered for the truth of the matter asserted, but rather was offered to demonstrate why Officer Butler went to Haskell's apartment, and was therefore admissible.

{¶16} In general, " '[t]he admission or exclusion of relevant evidence rests within the sound discretion of the trial court.' " *State v. Dean*, 146 Ohio St.3d 106, 2015–Ohio–4347, 54 N.E.3d 80, ¶ 87; quoting *State v. Sage*, 31 Ohio St.3d 173, 510 N.E.2d 343 (1987), paragraph two of the syllabus. However, " 'questions concerning evidentiary issues that also involve constitutional protections, including confrontation clause issues, should be reviewed de novo.' " *State v. Gerald*, 4th Dist. Scioto No. 12CA3519, 2014–Ohio–3629, ¶ 59; quoting *State v. Jeffers*, 4th Dist. Gallia No. 08CA7, 2009–Ohio–1672, ¶ 17. Therefore, we will review this assignment of error de novo because it raises a question of constitutional law.

{¶17} Further, we initially note that Evid.R. 103(A)(1) provides that a claim of error may not be predicated upon a ruling that admits or excludes evidence unless a substantial right of the party is affected; and, if the ruling is one admitting the evidence, the opponent of the evidence must raise a timely objection to the evidence, stating the specific ground of objection, unless the ground of objection is apparent from context. Here, Appellant

initially objected to the statement at issue based upon hearsay grounds at the time that Officer Butler testified. Appellant further moved for a dismissal of the case at the close of the State's evidence based upon a claimed violation of the Confrontation Clause. As a result, we conclude he has preserved this issue for review.

{¶18} "The Sixth Amendment's Confrontation Clause provides, 'In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * *.' " *State v. Maxwell*, 139 Ohio St.3d 12, 2014–Ohio–1019, 9 N.E.3d 930, ¶ 34. The Confrontation Clause of the Sixth Amendment is made applicable to the states by the Fourteenth Amendment. *State v. Issa*, 93 Ohio St.3d 49, 752 N.E.2d 904, fn. 4 (2001). Consequently, this constitutional right applies to both federal and state prosecutions, but the right of confrontation in Article I, Section 10 of the Ohio Constitution provides no greater right of confrontation than the Sixth Amendment. *State v. Arnold*, 126 Ohio St.3d 290, 2010–Ohio–2742, 933 N.E.2d 775, ¶ 12.

{¶19} "The United States Supreme Court has interpreted [the Sixth Amendment right to confrontation] to mean that admission of an out-of-court statement of a witness who does not appear at trial is prohibited by the Confrontation Clause if the statement is testimonial unless the witness is

unavailable and the defendant has had a prior opportunity to cross-examine the witness." *Maxwell* at ¶ 34; citing *Crawford v. Washington*, 541 U.S. 36, 53–54, 124 S.Ct. 1354 (2004). *Crawford* did not define the word "testimonial" but stated generally that the core class of statements implicated by the Confrontation Clause includes statements " 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.' " *Id.* at 52; quoting the amicus brief of the National Association of Criminal Defense Lawyers.

{¶20} Here, there is no real dispute that the statement at issue was testimonial and thus, the only issue is whether the statement constitutes hearsay. Hearsay is, "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). "To constitute hearsay, two elements are needed. First, there must be an out-of-court statement. Second, the statement must be offered to prove the truth of the matter asserted. If either element is not present, the statement is not 'hearsay.' " *State v. Maurer*, 15 Ohio St.3d 239, 262, 473 N.E.2d 768 (1984).

{¶21} However, the Supreme Court of Ohio clarified that the Confrontation Clause " 'does not bar the use of testimonial statements for

purposes other than establishing the truth of the matter asserted.' " *State v. Ricks*, 136 Ohio St.3d 356, 2013–Ohio–3712, 995 N.E.2d 1181, ¶ 18; quoting *Crawford* at fn. 9. The Court explained that extrajudicial statements made by out-of-court declarants offered to explain the subsequent investigative conduct of law enforcement are generally admissible, because the statements are not offered to prove the truth of the matter asserted. *Id.* at ¶ 20; citing *State v. Thomas*, 61 Ohio St.2d 223, 232, 400 N.E.2d 401 (1980). The Court recognized, however, that the admission of out-of-court statements to explain officer conduct in an investigation does carry with it the potential for abuse, and thus established certain conditions that must be met prior to admitting such statements. For example, the Court held that:

> "[I]n order for testimony offered to explain police conduct to be admissible as nonhearsay, the conduct to be explained should be relevant, equivocal, and contemporaneous with the statements; the probative value of statements must not be substantially outweighed by the danger of unfair prejudice; and the statements cannot connect the accused with the crime charged." *Id.* at ¶ 27.

{¶22} After applying the *Ricks* test to the present case, we conclude that the statement made by Haskell and testified to by Officer Butler meets the first part of the test. First, the fact that the statement explains why Officer Butler began his investigation of Appellant is relevant. Second, the conduct was equivocal; meaning that without the statement it would be

unclear why law enforcement went to Haskell's residence in the first place. Finally, Officer Butler's investigation of Appellant was contemporaneous with the statement made by Haskell.

{¶23} However, after applying the second part of the test, we conclude that even though the statement explains police conduct, it is also highly prejudicial and directly ties Appellant to the crime. In fact, the out-of-court statement at issue decisively labels Appellant as a manufacturer of methamphetamine, the exact crime that Appellant was charged with. Thus, the testimony could have encouraged the jury, intentionally or not, to misuse the content of the out-of-court statements for its truth. The jury could have interpreted Haskell's statement that Appellant was at his apartment cooking meth as a statement tying Appellant to the charged offense, rather than as evidence to explain why police had begun an investigation of Appellant.

{¶24} As such, we conclude that Officer Butler's testimony relating the out-of-court statement of Ernie Haskell constituted hearsay. The statement was offered to prove the truth of the matter asserted rather than to explain police conduct. Further, because the statement was testimonial, the admission of the statement violated Appellant's rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution.

{¶25} Nevertheless, although the court committed constitutional error, in *Ricks*, the Supreme Court of Ohio explained that such error can be harmless in certain circumstances:

> "A constitutional error can be held harmless if we determine that it was harmless beyond a reasonable doubt. *Chapman v. California* (1967), 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705. Whether a Sixth Amendment error was harmless beyond a reasonable doubt is not simply an inquiry into the sufficiency of the remaining evidence. Instead, the question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. *Id.* at 23, 87 S.Ct. 824, 17 L.Ed.2d 705; *State v. Madrigal* (2000), 87 Ohio St.3d 378, 388, 721 N.E.2d 52." *State v. Ricks* at ¶ 46; quoting *State v. Conway*, 108 Ohio St.3d 214, 2006–Ohio–791, 842 N.E.2d 996, ¶ 78.

{¶26} Here, although there is a possibility that the statement at issue might have carried some weight with the jury, we find that the trial court's immediate provision of a limiting instruction, which we presume the jurors followed, coupled with our disposition of Appellant's first assignment of error, where we concluded that Appellant lacked standing to challenge the search, renders the trial court's error harmless beyond a reasonable doubt.[1] More specifically, because of the unique facts of this case, which includes our determination that Appellant lacked standing to challenge the search, the fact of the search and the results of the search, including the admission of

[1] " 'A presumption always exists that the jury has followed the instructions given to it by the trial court.' " *State v. Murphy*, 4th Dist. Scioto No. 09CA3311, 2010─Ohio─5031, ¶ 81; quoting *Pang v. Minch*, 53 Ohio St.3d 186, 559 N.E.2d 1313 (1990), paragraph four of the syllabus.

testimony by Officer Butler that he recovered an active one-pot meth lab which Appellant confessed belonged to him, were properly considered and certainly would have carried more weight with the jury. As such, Officer Butler's testimony regarding the statement made by Haskell was largely cumulative to the other testimony demonstrating Appellant's guilt. Accordingly, we find no merit to Appellant's second assignment of error and it is overruled.

ASSIGNMENT OF ERROR III

{¶27} In his third assignment of error, Appellant contends that the trial court erred by denying his motion to dismiss based upon an alleged violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution. Specifically, Appellant argues that he had the right to confront Ernie Haskell, whose statement was admitted through the testimony of Officer Butler. However, Haskell did not testify at trial. The State responds by arguing that Appellant only had the right to confront witnesses who actually testified at trial and as Haskell did not actually testify, Appellant had no right to confront him.

{¶28} Appellant's assignment of error challenges the trial court's decision to deny his motion to dismiss. Generally, when reviewing a trial court's decision to grant or deny a motion to dismiss, an appellate court will

defer to a trial court's factual findings, but must independently determine, as a matter of law, whether the trial court erred in applying the substantive law to the facts of the case. *State v. Gilchrist*, 4th Dist. Athens No. 02CA26, 2003–Ohio–2601, ¶ 13; citing *State v. James*, 4th Dist. Vinton Nos. 00CA546, 00CA547, 00CA548, 00CA549, 00CA550, 00CA551, 2001–Ohio–2585; citing *State v. Fleming*, 11th Dist. Portage No. 96–P–0210, 1997 WL 269141 (Apr. 25, 1997); *see also State v. Williams*, 94 Ohio App.3d 538, 543, 641 N.E.2d 239 (1994); *Castlebrook, Ltd. v. Dayton Properties Ltd. Partnership*, 78 Ohio App.3d 340, 346, 604 N.E.2d 808 (1992). Accordingly, we apply a de novo standard of review. *Id.*

{¶29} As set forth above, "[t]he Sixth Amendment's Confrontation Clause provides, 'In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * *.' " *State v. Maxwell, supra*, at ¶ 34. Further, as we have already noted, "[t]he United States Supreme Court has interpreted [the Sixth Amendment right to confrontation] to mean that admission of an out-of-court statement of a witness who does not appear at trial is prohibited by the Confrontation Clause if the statement is testimonial unless the witness is unavailable and the defendant has had a prior opportunity to cross-examine the witness." *Id.* at ¶ 34; citing *Crawford v. Washington*, *supra*, at 53-54. Further, although

extrajudicial statements made by out-of-court declarants offered to explain the subsequent investigative conduct of law enforcement are generally admissible because the statements are not offered to prove the truth of the matter asserted, certain conditions that must be met prior to admitting such statements. *State v. Ricks, supra,* at ¶ 27.

{¶30} Here, we have already determined in our disposition of Appellant's second assignment of error that Appellant's constitutional right of confrontation was violated and that the trial court committed constitutional error in admitting Officer Butler's testimony regarding Ernie Haskell's statement. However, we also determined that such error was harmless beyond a reasonable doubt in light of the fact that Appellant lacked standing to challenge the search. As such, we cannot conclude that the trial court's denial of Appellant's motion to dismiss, which was based upon the same argument contained in Appellant's second assignment of error, was in error. Accordingly, we find no merit to Appellant's third assignment of error and it is overruled.

ASSIGNMENT OF ERROR IV

{¶31} In his fourth assignment of error, Appellant contends that the trial court erred by denying his motion for mistrial after the prosecutor's impermissible and false statements regarding his confession. Appellant

claims that statements made by the prosecutor during closing argument rose to the level of prosecutorial misconduct and that the general instruction given to the jury that arguments of counsel are not to be considered as evidence was insufficient to correct the error.

{¶32} The grant or denial of a motion for mistrial rests within the sound discretion of the trial court. *State v. Murphy*, *supra,* at ¶ 71; citing *State v. Sage*, 31 Ohio St.3d 173, 182, 510 N.E.2d 343 (1987). Under Crim.R. 33(A)(2) a trial court may grant a mistrial for "misconduct" of a prosecuting attorney. However, the trial court should not order a mistrial merely because of some intervening error or irregularity unless the substantial rights of the accused are adversely affected. *Id*.; citing *State v. Nichols*, 85 Ohio App.3d 65, 69, 619 N.E.2d 80 (1993). This determination is also within the sound discretion of the trial court. *Nichols* at 69.

{¶33} As we noted in *Murphy*, "[p]rosecutors are afforded a certain degree of latitude in their closing arguments." *Murphy* at ¶ 84; citing *State v. Keenan*, 66 Ohio St.3d 402, 409, 613 N.E.2d 203 (1993). "To determine whether comments made by a prosecutor during closing argument amount to misconduct warranting a mistrial, a court must examine 'whether the remarks were improper and, if so, whether they prejudicially affected substantial rights of the defendant.' " *Id*.; quoting *State v. Smith*, 14 Ohio

St.3d 13, 14, 470 N.E.2d 883 (1984). In order for a defendant to successfully move for a new trial based upon prosecutorial misconduct, the defendant must show that the prosecutor's conduct deprived the defendant of a fair trial. *State v. Keenan*, 66 Ohio St.3d 402, 405, 613 N.E.2d 203 (1993); *State v. Maurer*, 15 Ohio St.3d 239, 266, 473 N.E.2d 768 (1984). It must be clear beyond a reasonable doubt that, absent the prosecutor's conduct, the jury would not have found the defendant guilty. *Smith* at 15.

{¶34} The Supreme Court of Ohio has admonished us that prosecutorial misconduct constitutes reversible error only in " 'rare instances.' " *Keenan* at 405; quoting *State v. DePew*, 38 Ohio St.3d 275, 288, 528 N.E.2d 542 (1988). An appellate court must examine the prosecution's closing argument in its entirety to determine whether the remarks prejudiced the defendant. *State v. Treesh*, 90 Ohio St.3d 460, 466, 739 N.E.2d 749 (2001); *State v. Keenan* at 410. As such, it amounts to a de novo independent review.

{¶35} Here, Appellant complains of the following statements made by the prosecutor during closing arguments, regarding his confession: "the bottom line is this confession has been ruled on, voluntarily given. - Freely and voluntarily given. * * * And, again, this confession has already been ruled to be fine." Appellant objected to these statements on the record

during closing arguments and then moved for a mistrial in the presence of the jury. A bench conference was immediately held in which the judge admonished Appellant's counsel for making the motion in the presence of the jury. Closing arguments were concluded and then the trial court heard arguments on the motion after the jury retired to deliberate.

{¶36} The trial court agreed with Appellant, as do we, that the statements made by the prosecutor were improper as the subject of the validity or legality of Appellant's confession had never been expressly ruled upon by the trial court. The trial court properly admonished the prosecutor for making such statements. The trial court also admonished defense counsel for arguing that Appellant's confession was simply a sarcastic statement when there was no evidence in the record to support that argument aside from defense counsel's own statement. The record further indicates defense counsel argued Appellant did not even confess to law enforcement, essentially suggesting Officer Butler lied to the jury. Ultimately the trial court denied the motion, reasoning that the cautionary instruction provided to the jury at the time the statements were made, was sufficient. Based upon the following, we agree with the trial court's decision to deny the motion for mistrial.

{¶37} At the conclusion of the bench trial after Appellant's objections to the prosecutor's comments, the trial court instructed the jury as follows: "The Court sustains the objection, and that comment will not be considered by the Jury." In response, Appellant's counsel moved to strike, to which the trial court responded "I already said they can't consider it. It's the same thing." Appellant's counsel then moved for a mistrial and another bench conference was held. Thus, the trial court provided a specific limiting instruction to the jury not to consider the statement at the time the objection was made.

{¶38} Further, the trial court provided standard instructions to the jury at the beginning and at the close of trial. At the beginning of trial, the trial court instructed the jury, in pertinent part, as follows:

> "Now, if an attorney objects and the Court says * * * 'Sustained' then that means I have determined that either the question or the answer is not proper under the rules, and cannot come into evidence. Now, sometimes a witness will answer a question before the objection can be made, or while the objection is being made. If that occurs, then the Court will sometimes say 'You are to disregard that testimony.', or 'That testimony is stricken.' That means that you're not permitted to hear it. We know you're not computers and you can't simply erase your memory bank; but, what it means is when you're actually discussing the case, you're not permitted to bring that up in the discussion. And if anyone does, you have to say 'Wait. That evidence was not permitted. It was stricken. It is not part of our deliberations.' "

{¶39} Finally, upon instructing the jury at the close of trial, the trial court instructed the jury, in pertinent part, as follows:

> "Now, the Court again instructs you that the arguments of counsel are not evidence, and nothing that any of the attorneys said can be considered evidence. The evidence is what you heard, what the witnesses testified to, and what the exhibits are, and nothing else. And any other suggestion by counsel that there was some evidence in the case is not in itself evidence, it is only the evidence that came from the witness stand and the exhibits, not the Closing Arguments."

{¶40} Although we agree with Appellant that the comments made by the prosecution were improper, we conclude that the general instructions as well as the specific limiting instructions provided to the jury sufficiently corrected the error. " 'A presumption always exists that the jury has followed the instructions given to it by the trial court.' " *State v. Murphy, supra,* at ¶ 81; quoting *Pang v. Minch, supra,* at paragraph four of the syllabus. Given the trial court's instructions, we cannot say that the above comments prejudiced Appellant and denied him a fair trial, or that they changed the outcome of the trial. Accordingly, we find no merit to Appellant's fourth and final assignment of error and it is overruled.

{¶41} Having found no merit to the assignments of error raised by Appellant, the decision of the trial court is affirmed.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Highland County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, J.: Concurs in Judgment and Opinion.
Harsha, J.: Concurs in Judgment Only.

For the Court,

BY: _____
Matthew W. McFarland, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.