[Cite as *State v. Larkins*, 2008-Ohio-5982.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. W. Scott Gwin, P.J.
	:	Hon. Sheila G. Farmer, J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	
-vs-	:	
	:	Case No. 2007-CA-0092
DAWUNE LARKINS	:	2007-CA-0093
	:	
Defendant-Appellant	:	
	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Richland County Courty of Common Pleas, Case Nos. 2007-CR-209D and 2007-CR-425D
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	November 19, 2008

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JAMES J. MAYER, JR. PROSECUTING ATTORNEY BY: KIRSTEN L. PSCHOLKA-GARTNER 38 South Park Street Mansfield, OH 44902	ROBERT GOLDBERGER 13 Park Avenue West, Suite 300 Mansfield, OH 44902

Gwin, P.J.

{¶1} Defendant–appellant Dawune Larkins appeals from his convictions and sentences in the Richland County Court of Common Pleas on one count of aiding and abetting aggravated burglary with a firearm specification; one count of aiding and abetting aggravated robbery with a firearm specification; two counts of burglary, one count of receiving stolen property, a felony of the fifth degree; one count of improperly handling firearms in a motor vehicle, a felony of the fourth degree; one count of having a weapon while under a disability, a felony of the third degree; one count of possession of criminal tools, a felony of the fifth degree; one count of possession of a controlled substance, crack cocaine, a felony of the fourth degree; one count of possession of a controlled substance, Oxycodone, a felony of the fifth degree; and one count of possession of drug paraphernalia, a misdemeanor of the first degree. The plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} Ms. Evelyn Yahney is a sixty-seven year old widow who lives alone. On the evening of December 23, 2006, she let her dog outside and was sitting at her computer in the office, which is located just off the garage. She heard her dog barking frantically, as if he had seen something in the yard. When Ms. Yahney went to the door leading out to the garage to investigate, she saw a young, light to medium-skinned black man standing with his back to her. Through the closed door, she asked what he wanted. The man did not reply. Before she could open the door, the man smashed the door in, knocking Ms. Yahney into a bookcase. The man fell in the door, followed by Ms. Yahney's dog. He stumbled a distance into the room, grabbing her purse off the

doorknob in the office. He then fled the home. Ms. Yahney was so frightened by the burglary that she did not notice her purse was taken until Sunday, when she was getting ready to go to church.

{¶3} While the intruder who entered Ms. Yahney's residence appeared to be alone, there was some indication at trial that there may have been an accomplice. Richard Jones gave a statement to Detective Bob Mack of the Richland County Sheriff's Department about his involvement in the crime with the appellant, Dawune Larkins. He indicated that he went as far as the garage of Ms. Yahney's residence; however, he ran away when appellant kicked in the door. He stated that appellant later threatened him and his family because he ran away instead of helping with the burglary. At trial, Mr. Jones admitted that he might have been incarcerated in the Richland County Jail at the time Evelyn Yahney's house was burglarized. Scott Eberhart also testified that Mr. Jones was with appellant on the day Ms. Yahney's house was burglarized, and that they asked him to participate in the crime.

{¶4} On the evening of February 24, 2007, appellant, Richard Jones, Scott Eberhart, Matt Eberhart, Spencer Cansler, Jr., and Nico King were at appellant's house. While there, they came up with a plan to commit a series of robberies. Scott Eberhart suggested Manny Garza's trailer as a target for a robbery. Appellant retrieved at least one gun out of a closet inside his home to use in the commission of the crime. The group left appellant’s house in a greenish-colored Dodge minivan belonging to Spencer Cansler and Nico King's mother. The van had a broken back window covered in plastic.

{¶5} When they arrive at Manny Garza's trailer, Mr. Garza was at home with his young daughter. Four of the men got out of the van, approached the front door of the

residence, and tried to force their way inside. Mr. Garza pointed an unloaded gun out the window at the group, and they left. However, Mr. Garza saw the van circle around the trailer park and saw several of the men approach his trailer a second time. At that point, he called the police, giving a description of the van and the possible suspects. The men heard Mr. Garza on the phone with police and fled back to the van. As they were driving away from the trailer park, they passed a police car; however, they were not stopped.

{¶6} Next, the group went to the apartment of Sam Ramirez, a friend of the Eberhart family. Matt Eberhart suggested this residence because he knew that no one would be at home that night. On February 24, 2007, Mr. Ramirez lived at Brookfield Drive, Apartment 8. Scott and Matt Eberhart were dropped off at the apartment complex, where they broke into Mr. Ramirez' apartment. While they were inside, appellant had Spencer Cansler drive back to his house so that appellant could pick up his car. Appellant and Mr. Jones then followed the van back to the apartment complex to pick up Scott and Matt Eberhart. When they arrived, Scott and Matt loaded the stolen property, including a plasma screen television, a Bose stereo and speakers, and a coin collection, into the van. They then drove back to appellant's house to unload the items from the van.

{¶7} Following the Ramirez burglary, Scott suggested breaking into Joseph Poland's trailer and robbing him. Scott told appellant that he had bought marijuana off Mr. Poland in the past, and that there should be drugs and money in the residence. The group then got back into the van and drove to Mr. Poland's trailer, located at 475 South Diamond Street, Lot 11, in Mansfield, Ohio. Scott Eberhart and Richard Jones got out of

the van with a gun. Scott knocked on the door. When it was opened by Mr. Poland, Scott put the gun to his forehead and told him it was nothing personal. When Scott and Mr. Jones entered the trailer, they immediately grabbed the cell phones that were in the residence. One of those cell phones was used to call appellant, who was waiting outside in the van. While the men were inside the trailer, Mr. Poland's girlfriend, Liberty Roberts, attempted to go over and pick-up Mr. Poland's infant son who was in the playpen across the room. Richard Jones grabbed the gun from Scott Eberhart, cocked it, and pointed it at her. He told her that if she did not sit back down he would shoot her. While Scott Eberhart held the occupants of the trailer at gunpoint, Richard Jones stole an X-Box video game system, and some X-Box games.

{¶8} Appellant, Nico King, Matt Eberhart, and Spencer Cansler remained in the van while Scott Eberhart and Richard Jones entered the trailer. Appellant directed Matt Eberhart to drive around the trailer park until he received a call on his cell phone from Scott Eberhart and Richard Jones saying they were inside. When he got that call, he directed Nico King and Spencer Cansler to get out of the van and go inside to help. Spencer Cansler went in the open door of the residence and was directed by Mr. Jones to steal Mr. Poland's Terrier-Bullmastiff puppy. As soon as he grabbed the dog, the men walked out the door with the stolen property. While the van was driving away, Mr. Poland was able to obtain a description, which he gave to the police.

{¶9} After robbing Joseph Poland's trailer, the group once again returned to appellant's house and unloaded the stolen property. Matt Eberhart and Nico King then left in the van and returned to their home. A short time later, the police arrived at their residence, following up upon the information provided by Manny Garza and Joseph

Poland. Matt and Nico were arrested. They provided statements to the police about the break-ins and the involvement of appellant, Richard "Pete" Jones, and Spencer Cansler, Jr.

{¶10} Based upon the information provided by Nico King and Matt Eberhart, the police contacted Parole Officer Dan George, who was supervising appellant. Mr. George accompanied the police to appellant's house to conduct a search. When they entered the residence, they found Richard Jones in the bathroom. Mr. Jones was in possession of one of the cell phones stolen from Joseph Poland's trailer. When officers confronted appellant, they discover that he has crack cocaine in his front pants pocket. He was also found to be in possession of a crack pipe, and Oxycodone in a prescription bottle with the label partially torn off. Inside the garage of appellant's residence, police located a .380 semi-automatic handgun inside a plastic bag in a toolbox. Because he was under parole supervision, appellant was under disability from owning or possessing a firearm. In appellant's bedroom, the police located the plasma television and coins that were stolen from Sam Ramirez as well as the X-Box and X-Box games stolen from Joseph Poland.

{¶11} On April 5, 2007 in Case No. 2007-CR-209, the Richland County Grand Jury returned a ten-count indictment against appellant for the February 24, 2007 crimes. Appellant was indicted for aiding and abetting aggravated burglary with a firearm specification; aiding and abetting aggravated robbery with a firearm specification; burglary; receiving stolen property, felony of the fifth degree; improperly handling firearms; having a weapon while under a disability; possession of criminal tools, a felony of the fifth degree; possession of a controlled substance, crack cocaine, a felony of the

fourth degree; possession of a controlled substance, Oxycodone, a felony of the fifth degree; and drug paraphernalia, a misdemeanor of the first degree.

{¶12} On May 10, 2007, an additional indictment was issued under Case No. 2007-CR-425 charging appellant with aggravated burglary and burglary, concerning the December 23, 2006 crimes.

{¶13} On August 7, 2007, the appellant's cases were consolidated for trial.

{¶14} Trial commenced before a jury on September 6, 2007 and concluded on September 12, 2007. Appellant was convicted on all counts except the aggravated burglary charge concerning the home of Evelyn Yahney originally filed under Case No. 2007-CR-425.

{¶15} Appellant was sentenced to eight-years incarceration for the burglary conviction concerning Ms. Yahney's home. The trial court sentenced appellant to ten years for the aggravated burglary and ten years of the aggravated robbery of Joseph Poland, to be served concurrently; three years for the gun specification attached to those convictions; four years for the burglary of Mr. Ramirez's home; five years for having a weapon while under a disability; nine months for receiving stolen property; twelve months for improperly handling a firearm in a motor vehicle; nine months for possession of criminal tools; twelve months for possession of crack cocaine; nine months for possession of Oxycodone; and ten days for possession of drug paraphernalia. The court sentence appellant to serve the sentences for aggravated robbery of the Poland home, the burglary of the Ramirez home, the burglary of the Yahney home and the having a weapon while under a disability consecutively. Accordingly, appellant was sentenced to an aggregate prison term of thirty years.

{¶16} Appellant has timely appealed raising three assignments of error:

{¶17} "I. THE TRIAL COURT COMMITTED PLAIN ERROR IN ITS JURY INSTRUCTION ON THE CHARGES RELATED TO THE EVELYN YAHNEY BURGLARY.

{¶18} "II. THE TRIAL COURT COMMITTED PLAIN ERROR IN ITS JURY INSTRUCTION ON THE CHARGE RELATED TO THE JOSEPH POLAND ROBBERY.

{¶19} "III. THE TRIAL COURT ERRED IN ALLOWING EXHIBIT 1 INTO EVIDENCE."

I.

{¶20} In his first assignment and second assignments of error, appellant asserts that the trial court committed prejudicial error when it failed to properly instruct the jury.

{¶21} In his first assignment of error, appellant contends that because he was not charged with aiding and abetting burglary with respect to Ms. Yahney's home it was error to charge the jury on complicity. In his second assignment of error appellant asserts that the trial court incorrectly defined the offense of aggravated burglary relating to Joseph Poland's trailer. Appellant argues that the record does not contain evidence that anyone "inflicted bodily harm on the occupant of the residence." Because these assignments of error involve the trial court's instructions to the jury, we will address them together.

{¶22} The giving of jury instructions is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *State v. Martens* (1993), 90 Ohio App. 3d 338. In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable

and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217. Jury instructions must be reviewed as a whole. *State v. Coleman* (1988), 37 Ohio St. 3d 286.

{¶23} Crim.R. 30(A) governs instructions and states as follows:

{¶24} "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. Copies shall be furnished to all other parties at the time of making the requests. The court shall inform counsel of its proposed action on the requests prior to counsel's arguments to the jury and shall give the jury complete instructions after the arguments are completed. The court also may give some or all of its instructions to the jury prior to counsel's arguments. The court need not reduce its instructions to writing.

{¶25} "On appeal, a party may not assign as error the giving or the failure to give any instructions unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury."

{¶26} Appellant did not file a written request for specific jury instructions, and did not object to the trial court's jury instructions. (3T. at 832). Based upon appellant's failure to proffer instructions or object to the instructions and bring the issue to the trial court's attention for consideration, we must address this assignment under the plain error doctrine.

{¶27} In criminal cases, plain error is governed by Crim. R. 52(B), which states:

{¶28} "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." An alleged error "does not constitute a plain error ... unless, but for the error, the outcome of the trial clearly would have been otherwise." *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph two of the syllabus.

{¶29} The defendant bears the burden of demonstrating that a plain error affected his substantial rights. *United States v. Olano* (1993), 507 U.S. at 725,734, 113 S.Ct. 1770; *State v. Perry* (2004), 101 Ohio St.3d 118, 120 802 N.E.2d 643, 646. Even if the defendant satisfies this burden, an appellate court has discretion to disregard the error and should correct it only to 'prevent a manifest miscarriage of justice.' " *State v. Barnes* (2002), 94 Ohio St.3d 21, 27, 759 N.E.2d 1240, quoting *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph three of the syllabus. *Perry*, supra, at 118, 802 N.E.2d at 646.

{¶30} The Supreme Court has repeatedly admonished that this exception to the general rule is to be invoked reluctantly. "Notice of plain error under Crim. R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." Id. at paragraph three of the syllabus. See, also, *State v. Thompson* (1987), 33 Ohio St.3d 1, 10, 528 N.E.2d 542; *State v. Williford* (1990), 49 Ohio St.3d 247, 253, 551 N.E.2d 1279 (Resnick, J., dissenting).

{¶31} In *Neder v. United States* (1999), 527 U.S. 1, 119 S.Ct. 1827, the United State Supreme Court held that because the failure to properly instruct the jury is not in most instances structural error, the harmless-error rule of *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 applies to a failure to properly instruct the jury, for

it does not *necessarily* render a trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.

{¶32} A. Aiding and Abetting.

{¶33} In the case at bar, relevant to this assignment of error, appellant was convicted of aiding and abetting aggravated burglary and aiding and abetting burglary of the home of Ms. Evelyn Yahney. Generally, a criminal defendant has aided or abetted an offense if he has supported, assisted, encouraged, cooperated with, advised, or incited another person to commit the offense. See *State v. Johnson* (2001), 93 Ohio St.3d 240, 754 N.E.2d 796, syllabus. "'Participation in criminal intent may be inferred from presence, companionship and conduct before and after the offense is committed.' " *State v. Mendoza* (2000), 137 Ohio App.3d 336, 342, 738 N.E.2d 822, quoting *State v. Stepp* (1997), 117 Ohio App.3d 561, 568-569, 690 N.E.2d 1342.

{¶34} R.C. 2923.03 provides: "(A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:

{¶35} "* * *

{¶36} "(2) Aid or abet another in committing the offense."

{¶37} R.C. 2923.03(F) states, "A charge of complicity may be stated in terms of this section, or in terms of the principal offense."

{¶38} "The Supreme Court of Ohio clarified Ohio's position on the issue of complicity in *State v. Perryman* (1976), 49 Ohio St. 2d 14, vacated in part on other grounds sub nom, *Perryman v. Ohio* (1978), 438 U.S. 911. The court unequivocally approved of the practice of charging a jury regarding aiding and abetting even if the defendant was charged in the indictment as a principal. Id. The court held that the

indictment as principal performed the function of giving legal notice of the charge to the defendant. Id. Therefore, if the facts at trial reasonably supported the jury instruction on aiding and abetting, it is proper for the trial judge to give that charge. *Perryman,* supra at 27, 28." *State v. Payton* (April 19, 1990), 8th Dist. Nos. 58292, 58346.

{¶39} R.C. 2923.03(F) adequately notifies defendants that the jury may be instructed on complicity, even when the charge is drawn in terms of the principal offense. *United States v. McGee* (6th Cir 2008), 529 F.3d 691, 695; *State v. Herring* (2002), 94 Ohio St.3d 246, 251 762 N.E.2d 940, 949; *State v. Keenan* (1998), 81 Ohio St.3d 133, 151, 689 N.E.2d 929, 946; *State v. Templeton,* Richland App. No. 2006-CA-33, 2007-Ohio-1148 at ¶ 63.

{¶40} Appellant does not argue that his convictions for aggravated burglary and burglary are against the sufficiency of the evidence or against the manifest weight of the evidence.

{¶41} We find no plain error in the trial court's instruction to the jury on the issue of aiding and abetting aggravated burglary and burglary.

{¶42} B. Infliction of Bodily Harm.

{¶43} Appellant was further convicted of aggravated burglary with respect to Joseph Poland's trailer. Specifically, the trial court instructed the jury, "...Before you can find him guilty of that crime, you must find beyond a reasonable doubt that on February 24th 2007…, [appellant] purposely aided or abetted another in trespassing by force, stealth or deception in an occupied structure... where another person other than an accomplice of the offender is present... and the offender or the person he aided or abetted inflicts bodily harm on the occupant of the residence…" (3T. at 809-810).

{¶44} The state concedes that the record contains no evidence that anyone inflicted bodily harm on any person present in Mr. Poland's trailer at the time of the intrusion. However, the state argues, and the appellant concedes, that the record does contain evidence of threats of harm to Mr. Poland, his girlfriend and her brother during the intrusion into the trailer.

{¶45} R.C. 2911.11(A)(1) section defines the offense of aggravated burglary as follows: "(A) No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply: (1) The offender inflicts, or attempts or *threatens to inflict* physical harm on another…" (Emphasis added).

{¶46} Looking at all of the evidence before us, we find appellant was not prejudiced by the trial court's incorrect jury instruction on the infliction of bodily harm. Appellant would still have been convicted had the trial court given the correct jury instruction defining aggravated burglary as including "threats to inflict bodily harm".

{¶47} It appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Neder,* supra*,* 527 U.S. at 16, 119 S.Ct. 1837. (Quoting *Chapman* v. *California*(1967)*,* 386 U.S. 18, 24 87 S.Ct. 824), See, also *Delaware v. Van Arsdall*(1986)*,* 475 U.S. 673, 681, 106 S.Ct. 1431. ("[A]n otherwise valid conviction should not be set aside if the reviewing court may confidently say, on

the whole record, that the constitutional error was harmless beyond a reasonable doubt").

{¶48} Accordingly, appellant's first and second assignments of error are denied.

III.

{¶49} In his third assignment of error appellant maintains that the trial court erred in admitting into evidence at trial the photo array used by the police in their attempt to identify the perpetrator in the Evelyn Yahney case. We disagree.

{¶50} The photo array was not disclosed to appellant prior to trial. Appellant argues that the prejudice was compounded by the fact that his trial counsel told the jury during her opening statement that "[w]e believe that you will not be hearing or seeing evidence of a photo line-up. Frankly, we believe that you will not be presented with any forensic evidence or scientific evidence that will place Mr. Larkins at either of these two locations where the burglaries took place…" (1T. at 157).

{¶51} Due process requires that the prosecution provide defendants with any evidence that is favorable to them whenever that evidence is material either to their guilt or to punishment. *Brady v. Maryland* (1963), 373 U.S. 83, 87 83 S.Ct. 1194; *State v. Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837 at ¶ 39. Evidence is considered material when "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley* (1985), 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481. This standard of materiality does not require that disclosure of the evidence would have resulted in the defendant's acquittal. *United States v. Agurs* (1976), 427 U.S. 97, 111, 96 S.Ct. 2392, 49 L.Ed.2d 342.

{¶52} In determining materiality, the relevant question "is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley* (1995), 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490; *State v. Brown*, supra at ¶ 40. Thus, the rule set forth in *Brady* is violated when the evidence that was not disclosed "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Id. at 435, 115 S.Ct. 1555, 131 L.Ed.2d 490. In the end, this standard not only protects defendants; by ensuring a fair trial, it also protects the system of justice as a whole. *State v. Brown*, supra, 115 Ohio St.3d 55, 2007-Ohio-4837 at ¶ 40.

{¶53} As a rule, undisclosed evidence is not material simply because it may have helped the defendant to prepare for trial. The United States Supreme Court has rejected a standard of materiality that focuses "on the impact of the undisclosed evidence on the defendant's ability to prepare for trial, rather than the materiality of the evidence to the issue of guilt or innocence." *Agurs*, 427 U.S. at 112-113, 96 S.Ct. 2392, 49 L.Ed.2d 342, fn. 20; *State v. Brown*, supra at ¶ 49.

{¶54} In the case at bar, the record indicates that the state did not ask Ms. Yahney about the photo array. It was appellant's trial counsel that first asked Ms. Yahney if the police had shown her any photographs from which to identify the intruder. (1T. at 180 - 181). In reality, it was a question from one of the jurors that led the state to introduce the actual photo array into evidence. (1T. at 184; 185-186). Defense counsel did not object to the trial judge asking the witness the question posed by the jury about the photo array. (1T. at 185). When asked by the trial court if she remembered whether

any of the pictures in the photo array matched the appellant, Ms. Yahney replied, “I’m not sure.” (1T. at 187). Thereafter the state marked the photo array, and showed it to the witness. (Id.).

{¶55} As the trial court noted in overruling appellant’s objection to the admission of the photo array into evidence,

{¶56} "I don't think the jury had that impression at all, and this is the reason I say it: When Ms. Yahney was on the stand, you pursued about whether she had seen a photo array. After you had her describe seeing a photo array then Mr. Bishop brought it out and marked it as an exhibit, and then on re-cross you had her look at the photo array and asked whether the defendant's picture was in there, and point out that she was unable - and it is there, his picture was there.

{¶57} “She was unable at the time it was shown to her to identify the defendant to show that her identification of him in the courtroom here as ninety percent certain was suspect. Because at the time of the crime she had seen his picture and was unable to identify him.

{¶58} “So I think it was used to your benefit. I think it was something that you made a tactical decision to use. For that reason, I don't think there is prejudice or improper conduct by the prosecutor that would justify its not being admitted. I think it's probably to your benefit, but, again, that's for the jury to decide." (3T. at 693-94).

{¶59} The photo array was brought up again during the testimony of Detective Bob Mack. On direct-examination, the prosecution inquired as to the format of the line-up that was shown to Evelyn Yahney. (3T. at 700-702). After explaining how he compiled the photo line-up, Detective Mack identified Court's Exhibit 1 as the line-up

that he showed Ms. Yahney. (3T. at 703). He testified that at that time, Ms. Yahney was able to narrow it down to two photos before pointing at photo number three which was appellant's picture. (3T. at 703-704).

{¶60} The defense then cross-examined Detective Mack as to whether the photo array was passed on to the prosecutor's office. (3T. at 705). He indicated that it was part of a large packet that was sent over, but it was possible that it was misplaced. (Id.). The defense also questioned Detective Mack regarding Ms. Yahney's identification. He indicated that he showed Ms. Yahney the photo line-up at her home in the latter part of March or the early part of April 2007. (3T. at 705-706). When he was told that Ms. Yahney testified that she was not able to identify anyone as the perpetrator, Detective Mack stated, "that's not the indication she gave me." (3T. at 706). He testified that Ms. Yahney studied each individual in the line-up before narrowing it down to two people and then concentrating on individual number three. (3T. at 707-708; 709). Detective Mack indicated that once Ms. Yahney was shown the photo line-up, there was no conversation about any facial features. (3T. at 708). When he was asked if it would surprise him if Ms. Yahney testified in court that she was not able to identify the perpetrator, he stated "not necessarily." (3T. at 709).

{¶61} Following defense counsel's cross-examination of Detective Mack, the trial court gave the following instruction to the jury:

{¶62} "Folks, I might say one thing here at this point. There are rules called discovery rules that apply during a trial in preparation for trial. Under those discovery rules, the parties are supposed to exchange the evidence they expect to use at trial.

{¶63} “This photo array is one of those things that arguably should have been provided to the defendant by the prosecutor, but the prosecutor didn't do that in this case. So Ms. Dees has only learned about this exhibit during the course of trial when Ms. Yahney was on the stand. So that's one of the reasons why it came up a little differently in this case. It's something she should have got in advance, but didn't." (3T. 709-710).

{¶64} When the prosecutor objected to the trial court's implication of wrongdoing, the trial court provided an additional statement to the jury that the prosecutor did not intend to use the exhibit at the start of trial, but decided to use it after it came up during the course of the trial. (3T. at 710-711).

{¶65} Crim.R. 16(E) (3) vests in the trial court the discretion to determine the appropriate response for failure of a party to disclose material subject to a valid discovery request. In *State v. Parson* (1983), 6 Ohio St.3d 442, 445, 6 OBR 485, 487, 453 N.E.2d 689, 691, the court observed that, under such circumstances, "the trial court is vested with a certain amount of discretion in determining the sanction to be imposed for a party's nondisclosure of discoverable material. The court is not bound to exclude such material at trial although it may do so at its option." Reversible error exists only where the exercise of such authority by the trial court constitutes an abuse of discretion. *State v. Parson,* supra, at 445, 6 OBR at 487-488, 453 N.E.2d at 691; *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 26, 514 N.E.2d 394, 402.

{¶66} In *State v. Heinish* (1990), 50 Ohio St.3d 231, 553 N.E.2d 1026, the Ohio Supreme Court held "that upon the state's failure to provide discovery in compliance with Crim.R. 16(E)(3), the testimony of the undisclosed witness can be admitted if it can

be shown that the failure to provide discovery was not willful, foreknowledge of the statement would not have benefited the defendant in the preparation of the defense, and the defendant was not prejudiced by the admission of the evidence." Id. at 236, 553 N.E.2d 1026**,** citing *State v. Parson* (1983), 6 Ohio St.3d 442, 445-446, 453 N.E.2d 689, 692. The same three-part test also applies for determining whether a trial court has abused its discretion in admitting other evidence that was not properly disclosed by the State under Crim.R. 16 but was admitted at trial. See, *Scudder,* supra.

{¶67} There is nothing in the record below to indicate that the state's failure to disclose the photograph was a willful violation of Crim.R. 16 or anything other than a negligent omission on its part. See *State v. Edwards* (1976), 49 Ohio St.2d 31, 42, 358 N.E.2d 1051. Second, the appellant has not demonstrated how foreknowledge of the non-disclosed photograph would have benefited him in the preparation of his defense. The trial court informed the jury that appellant's trial counsel should have been, but was not, given the photo array before trial. Therefore, the jury was aware that defense counsel had not intentionally misrepresented the facts in her opening statement. Appellant does not allege or demonstrate on appeal how the admission of the photo array was prejudicial.

{¶68} Accordingly, prejudicial effect upon appellant was not demonstrated. See *State v. Cooper* (1977), 52 Ohio St.2d 163, 177; *State v. Parsons,* supra, 6 Ohio St.3d at 445, 453 N.E.2d at 692.

{¶69} Appellant's third assignment of error is denied.

{¶70} For the foregoing reasons, the judgment of the Court of Common Pleas of Richland County, Ohio, is affirmed.

By Gwin, P.J.,

Farmer, J., and

Wise, J., concur

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HON. W. SCOTT GWIN

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HON. SHEILA G. FARMER

_____
HON. JOHN W. WISE

WSG:clw 1031

[Cite as *State v. Larkins*, 2008-Ohio-5982.]

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
DAWUNE LARKINS	:	
Defendant-Appellant	:	CASE NO. 2007-CA-0092 2007-CA-0093

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Richland County, Ohio, is affirmed. Costs to appellant.

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HON. W. SCOTT GWIN

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HON. SHEILA G. FARMER

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HON. JOHN W. WISE