[Cite as *State v. Conley*, 2009-Ohio-2903.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	
-vs-	:	
	:	Case No. 2009-CA-19
MICHAEL JASON CONLEY	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Richland County Court of Common Pleas, Case No. 08-CR0016
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	June 17, 2009

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
KIRSTEN L. PSCHOLKA-GARTNER Assistant Richland County Prosecutor 38 South Park Street Mansfield, OH 44902	DAVID HOMER 13 Park Avenue West, Suite 609 Mansfield, OH 44902

Gwin, P.J.

{¶1} Defendant-appellant, Michael Jason Conley, appeals from his convictions and sentences in the Richland County Court of Common Pleas on one count of identity fraud, a felony of the third degree with the value of the credit, property, services, debt, or other legal obligation involved being more than $5,000 but less than $100,000; and one count of misuse of credit cards, a felony of the fourth degree with the cumulative retail value of the property or services involved being more than $5,000 but less than $100,000. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE[1]

{¶2} On April 5, 2007, Michael Lee Conley was at work when he received a phone call from a fraud investigator with Chase Bank. When the investigator told Mr. Conley that there had been suspicious activity on a credit card account in his name, Mr. Conley advised that he did not have a Chase Bank credit card, nor had he ever applied for one. Following this call, Mr. Conley learned that, in fact, a Marathon Master Card and a B.P. gas card had been issued in his name through Chase Bank. A Master Card had also been fraudulently issued in Mr. Conley's name through Citi Bank.

{¶3} When Mr. Conley obtained a list of the charges on the credit cards, he learned that the cards had been used at the 42 Motel and the Mansfield Inn. Mr. Conley went to both motels and obtained copies of the credit card receipts and the registration cards filled out by the person who rented the rooms. The registration cards listed his

[1] Appellant initially filed a direct appeal of his conviction in case number 2008-CA-0081. This Court dismissed that appeal on January 12, 2009 for lack of a final appealable order pursuant to the Ohio Supreme Court's decision in *State v. Baker* (2008), 119 Ohio St.3d 197. Thereafter, the trial court issued an amended sentencing entry on January 23, 2009, stating that a jury had convicted the Appellant. Appellant has timely appealed from that sentencing entry in the above-captioned case.

son, Michael Jason Conley's former address, 332 Terrace Court, Mansfield, Ohio 44905. The signature of the registration cards was "M. J. Conley."

{¶4} At that point, Mr. Conley contacted the Richland County Sheriff's Department to report the fraud. He advised Deputy Michael Patrlja that he believed his son, appellant, had opened the credit card accounts in his name. Mr. Conley advised that appellant lived with his ex-wife, who still had documents with his identifying information in her possession.

{¶5} After speaking to Mr. Conley, Deputy Patrlja obtained documents from Chase and Citi Bank regarding the fraudulent credit card accounts. Among the documents he obtained were the telephone applications. All three applications contained the identifying information of Michael L. Conley, including his social security number, date of birth, place of employment, work phone number, and mother's maiden name. However, instead of listing Mr. Conley's address, 1525 Plum Place in Mansfield, Ohio, the applications listed the address 745 Armstrong Avenue in Mansfield, Ohio. Appellant lived at 745 Armstrong Avenue with his mother, Mr. Conley's ex-wife. The applications also listed appellant's home phone number rather than Mr. Conley's.

{¶6} As a result of this information, Deputy Patrlja contacted appellant's Probation Officer, Alvin Thomas, to search the appellant's residence.

{¶7} Mr. Thomas went to 745 Armstrong Avenue on April 19, 2007. The young woman who answered the door allowed him to enter the residence and permitted him to search appellant's bedroom. Inside a dresser drawer, Mr. Thomas located a wallet that contained the Marathon Master Card from Chase and the Citi Bank Master

Card. The wallet also contained appellant's social security card and state identification card.

{¶8} Prior to Mr. Thomas' testimony, the defense expressed concern that his employment as a probation officer would lead the jury to believe that the appellant had a criminal record. Therefore, the trial court limited Mr. Thomas to testifying that he was employed as an investigator for the State of Ohio. The defense raised an objection and moved for a mistrial after Mr. Thomas testified that the appellant was in custody when his bedroom was searched. The trial court overruled the motion for a mistrial, holding that it was reasonable for the jury to presume that he was in custody on this case.

{¶9} Once the credit cards were located, Deputy Patrlja interviewed appellant. He admitted to opening the credit card accounts, stating that he had obtained brochures from a gas station and applied for the cards over the phone. Appellant claimed that he had given his own identifying information to apply for the cards; however, when confronted with the fact that his father's name and identifying information were on the applications, appellant abruptly ended the interview.

{¶10} In total, appellant charged $5,671.52 on the two Master Cards. The total balance on the Citi Bank Master Card was $2,212.66 with transactions plus fees. The transactions alone totaled $2166.67. On the Marathon Master Card from Chase Bank, the total of all of the transactions amounted to $3,504.85; however, due to loss-sharing agreements with merchants, Chase only suffered an actual loss of approximately $1,600. Chase also suffered a loss of approximately $300 on the B.P. card that was not recovered.

{¶11} At the conclusion of the State's case, the defense raised a Crim.R. 29 motion for acquittal. The trial court overruled the motion for acquittal.

{¶12} At the conclusion of the trial, the jury found appellant guilty of both counts charged in the indictment. The trial court sentenced appellant to two years on Count I, and one year on Count II. Because the two charges could be considered allied offense, the trial court ordered the two sentences to be served concurrently.

{¶13} It is from this conviction and sentence appellant appeals, raising the following four assignments of error:

{¶14} "I. THE TRIAL COURT ERRED PREJUDICIALLY BY REFUSING TO GRANT A MISTRIAL WHEN THE STATE'S WITNESS ASSERTED THAT THE APPELLANT WAS IN CUSTODY WHEN CREDIT CARDS WERE OBTAINED FROM HIS RESIDENCE.

{¶15} "II. THE TRIAL COURT ERRED PREJUDICIALLY BY REFUSING TO GRANT THE RULE 29 MOTION FOR ACQUITTAL AT THE CLOSE OF THE STATE'S CASE.

{¶16} "III. THE TRIAL COURT ERRED PREJUDICIALLY BY REFUSING TO ADMIT THE INVESTIGATING OFFICER'S SUPPLEMENTAL REPORT INTO EVIDENCE.

{¶17} "IV. THE VERDICT IS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE. THE EVIDENCE IS INSUFFICIENT AS A MATTER OF LAW. THE CONVICTION AND SENTENCE ARE CONTRARY TO LAW."

I.

{¶18} In his first assignment of error, appellant contends that the trial court erred in denying his motion for a mistrial. Specifically, appellant asserts the motion for mistrial should have been granted after the prosecutor elicited testimony from appellant's probation officer, Alvin Thomas, that appellant was in custody at the time his bedroom was searched. Appellant argues that the prosecutor intentional violated the trial court's pre-trial order that prohibited the state from informing the jury that Mr. Thomas was appellant's probation officer because this would lead the jury to believe that the appellant had a criminal record.

{¶19} The granting of a mistrial rests within the sound discretion of the trial court as it is in the best position to determine whether the situation at hand warrants such action. *State v. Glover* (1988), 35 Ohio St.3d 18, 517 N.E.2d 900; *State v. Jones* (1996) 115 Ohio App.3d 204, 207, 684 N.E.2d 1304, 1306.

{¶20} "A mistrial should not be ordered in a criminal case merely because some error or irregularity has intervened * * *." *State v. Reynolds* (1988), 49 Ohio App. 3d 27, 33, 550 N.E.2d 490, 497. The granting of a mistrial is necessary only when a fair trial is no longer possible. *State v. Franklin* (1991), 62 Ohio St. 3d 118, 127, 580 N.E.2d 1, 9; *State v. Treesh* (2001), 90 Ohio St.3d 460, 480, 739 N.E. 2d 749, 771. When reviewed by the appellate court, we should examine the climate and conduct of the entire trial, and reverse the trial court's decision as to whether to grant a mistrial only for a gross abuse of discretion. *State v. Draughn* (1992), 76 Ohio App. 3d 664, 671, 602 N.E.2d 790, 793-794, citing *State v. Maurer* (1984), 15 Ohio St.3d 239, 473 N.E.2d 768,

certiorari denied (1985), 472 U.S. 1012, 105 S.Ct. 2714, 86 L.Ed.2d 728; *State v. Gardner*(1998), 127 Ohio App.3d 538, 540-541, 713 N.E.2d 473, 475.

{¶21} In evaluating whether the trial judge acted properly in declaring a mistrial, the court has been reluctant to formulate precise, inflexible standards. Rather, the court has deferred to the trial court's exercise of discretion in light of all the surrounding circumstances:

{¶22} " * * * We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes. * * * But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office." *United States v. Perez* (1824), 22 U.S. (9 Wheat. 579, 580) 6 L.Ed. 165. See, also, *United States v. Clark* (C.A. 2, 1979), 613 F.2d 391, certiorari denied 449 U.S. 820, 101 S.Ct. 78, 66 L.Ed.2d 22 (a second prosecution is not barred on double jeopardy grounds when the trial judge had no reasonable alternative to ordering a mistrial in the first trial); *State v. Widner* (1981), 68 Ohio St.2d 188, 190, 429 N.E.2d 1065, 1066-1067.

{¶23} In *Illinois v. Somerville* (1973), 410 U.S. 458, 464, the Supreme Court further refined the circumstances under which a trial court can order a mistrial:

{¶24} "A trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial. If an error would make reversal on appeal a certainty, it would not serve 'the ends of public justice' to require that the Government proceed with its proof when, if it succeeded before the jury, it would automatically be stripped of that success by an appellate court."

{¶25} In *Arizona v. Washington* (1978), 434 U.S. 497, 98 S.Ct. 824, the Court stressed the "special respect" to be accorded a trial judge's determination to declare a mistrial as the only remedy to any of the wide spectrum of trial problems which could force the judge to so decide, problems which might not necessarily appear in the same light to an appellate court.

{¶26} "* * * [T]he trial judge must have the power to declare a mistrial in appropriate cases. The interest in orderly, impartial procedure would be impaired if he were deterred from exercising that power by a concern that any time a reviewing court disagreed with his assessment of the trial situation a retrial would automatically be barred. The adoption of a stringent standard of appellate review in this area, therefore, would seriously impede the trial judge in the proper performance of his 'duty * * *.'

{¶27} "There are compelling institutional considerations militating in favor of appellate deference to the trial judge's evaluation of the significance of possible juror bias. He has seen and heard the jurors during their *voir dire* examination. He is the

judge most familiar with the evidence and the background of the case on trial. He has listened to the tone of the argument as it was delivered and has observed the apparent reaction of the jurors. In short, he is far more 'conversant with the factors relevant to the determination' than any reviewing court can possibly be. See *Wade v. Hunter,* 336 U.S. 684, 687, 69 S.Ct. 834, 836, 93 L.Ed. 974." *Arizona, supra,* 513-514; *State v. Stimmel* (Feb. 20, 1986), Franklin App. No. 85AP-647.

{¶28} After considering the statement in light of the circumstances under which it was made, and the possible effect of the testimony on the jury, we find Alvin Thomas' testimony that the appellant was in custody at the time his bedroom was searched was not so prejudicial that an impartial verdict could not be reached. The court examined the facts and circumstances surrounding Mr. Thomas' testimony that the appellant was in custody at the time of the search, holding "[i]t would be reasonable to assume that if he was in custody, he was in custody on this case." (2T. 177-178). Further, the reference was a single, isolated remark. In addition, the trial court immediately gave the jury a curative instruction. The trial court instructed the jury:

{¶29} "Ladies and gentlemen, I've been asked to give an instruction relating to the fact that the witness had indicated that the Defendant was in custody. The fact that he may or may not have been in custody cannot be considered as evidence in this case, because it's not pertinent to the evidence in this case, and so I'll ask you to essentially disregard that and not consider the fact that he allegedly was in custody as evidence in this case, because it's not part of the elements in this case and it's not to be considered." (2T. 179-180).

{¶30} A jury is presumed to follow instructions given it by the court. *State v. Henderson* (1988), 39 Ohio St.3d 24, 528 N.E.2d 1237. See also, *State v. Campbell* (1994), 69 Ohio St.3d 38, 51 (where the Court opined that it was implausible for that defendant to argue that the jury determined a capital case based on a minor legal misstatement made by the state during voir dire).

{¶31} In the present case, the trial court properly exercised its discretion in denying the appellant's motion for a mistrial.

{¶32} Appellant's first assignment of error is overruled.

II & IV

{¶33} Because appellant's second and fourth assignments of error each require us to review the evidence, we shall address the assignments collectively.

{¶34} In his second assignment of error appellant alleges that the trial court erred in not granting his Crim. R. 29 motion for acquittal at the conclusion of the State's case. In determining whether a trial court erred in overruling an appellant's motion for judgment of acquittal, the reviewing court focuses on the sufficiency of the evidence. See, *e.g., State v. Carter* (1995), 72 Ohio St.3d 545, 553, 651 N.E.2d 965, 974; *State v. Jenks* (1991), 61 Ohio St.3d 259 at 273, 574 N.E.2d 492 at 503.

{¶35} In his fourth assignment of error appellant maintains that his conviction is against the sufficiency of the evidence and against the manifest weight of the evidence, respectively.

{¶36} When reviewing the sufficiency of the evidence, our inquiry focuses primarily upon the adequacy of the evidence; that is, whether the evidence, if believed, reasonably could support a finding of guilt beyond a reasonable doubt. See *State v.*

Thompkins (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541, 546 (stating, “sufficiency is the test of adequacy”); *State v. Jenks* (1991), 61 Ohio St.3d 259 at 273, 574 N.E.2d 492 at 503. The standard of review is whether, after viewing the probative evidence and inferences reasonably drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781; *Jenks,* 61 Ohio St.3d at 273, 574 N.E.2d at 503.

{¶37} Weight of the evidence addresses the evidence's effect of inducing belief. *State v. Wilson,* 713 Ohio St.3d 382, 387-88, 2007-Ohio-2202 at ¶ 25-26; 865 N.E.2d 1264, 1269-1270. “In other words, a reviewing court asks whose evidence is more persuasive--the state's or the defendant's? Even though there may be sufficient evidence to support a conviction, a reviewing court can still re-weigh the evidence and reverse a lower court's holdings.” *State v. Wilson,* supra. However, an appellate court may not merely substitute its view for that of the jury, but must find that "the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Thompkins*, supra, 78 Ohio St.3d at 387. (Quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717, 720-721). Accordingly, reversal on manifest weight grounds is reserved for "the exceptional case in which the evidence weighs heavily against the conviction." *State v. Thompkins,* supra.

{¶38} In *State v. Thompkins* supra, the Ohio Supreme Court held "[t]o reverse a judgment of a trial court on the basis that the judgment is not sustained by sufficient evidence, only a concurring majority of a panel of a court of appeals reviewing

the judgment is necessary." Id. at paragraph three of the syllabus. However, to "reverse a judgment of a trial court on the weight of the evidence, when the judgment results from a trial by jury, a unanimous concurrence of all three judges on the court of appeals panel reviewing the case is required." Id. at paragraph four of the syllabus; *State v. Miller* (2002), 96 Ohio St.3d 384, 2002-Ohio-4931 at ¶38, 775 N.E.2d 498.

{¶39} Employing the above standard, we believe that the State presented sufficient evidence from which a jury could conclude, beyond a reasonable doubt, that appellant committed the offense of identity fraud, with the value of the credit, property, services, debt, or other legal obligation involved being more than $5,000 but less than $100,000; and misuse of credit cards, with the cumulative retail value of the property or services involved being more than $5,000 but less than $100,000.

{¶40} Appellant was convicted of identity theft. R.C. 2913.49(B)(1) provides, “No person, without the express or implied consent of the other person, shall use, obtain, or possess any personal identifying information of another person with intent to do either of the following: (1) Hold the person out to be the other person…”

{¶41} Appellant was further convicted of misuse of a credit card. R.C. 2913.21(B) (2) provides, “No person, with purpose to defraud, shall do any of the following: (2) Obtain property or services by the use of a credit card, in one or more transactions, knowing or having reasonable cause to believe that the card has expired or been revoked, or was obtained, is retained, or is being used in violation of law…”

{¶42} The victim, Michael Lee Conley stated that he had never applied for or owned any credit cards, and he did not have an account with either of the issuing banks. Mr. Conley testified that he did not give anyone permission to take out a credit

card in his name, and that those credit cards were taken out without his knowledge. He further testified that neither of the credit cards was ever sent to his address.

{¶43} Alvin Thomas testified that he is employed in an investigative capacity with the State of Ohio. In that capacity, he went to 745 Armstrong Avenue in Mansfield, Ohio on April 19, 2007 to investigate the appellant for fraudulently obtaining credit cards in someone else's name. (T. 173-174). Mr. Thomas testified that he had made previous contact with the appellant at that address, and knew that the appellant lived at the residence with his mother. (2T. 174).

{¶44} Mr. Thomas testified that he made contact with a young woman who was at the residence. The appellant's mother was not home at the time because she was at a doctor's appointment; however, the young woman gave him permission to enter the residence and to search the appellant's room. (2T. 175-176). He searched what appeared to be a makeshift bedroom in the garage area. Inside the top left hand dresser drawer, he located the appellant's wallet containing the two credit cards. (2T. 176). Mr. Thomas identified State's Exhibit 2, the Citi Bank Master Card, and State's Exhibit 5, the Marathon Master Card issued by Chase Bank, as the cards that he found in the appellant's bedroom. (2T. 176-177). On cross-examination, Mr. Thomas testified that the wallet in which the credit cards were found also contained the appellant's social security card, bus tickets, and a state identification card. (2T. 178).

{¶45} The appellant admitted to the police that the credit cards were his, and that he opened the accounts. He stated that he found the brochures at a gas station, called the phone number, gave his information, and received the credit cards. However, he denied using his father's identifying information to open the accounts. (2T. 191, 193-

194). Appellant did not deny using the credit cards, stating, “If they’re stupid enough to give somebody like me credit and money to spend, I’m going to spend it.” (2T. 194-195). When Deputy Patrlja confronted appellant with the fact that the applications contained all of his father’s identifying information except the address where the credit card was sent, appellant said “F you, I don’t want to talk anymore.” (2T. 195).

{¶46} From the testimony of Brian Rozanski of Citi Bank, and Heather Sliemers of Chase Bank, and the account records which were submitted as evidence, the jury could determine that the total value of property or services charged on the credit cards was $5,671.52. The fact that Chase was able to have some of the affected businesses absorb parts of the loss does not change the fact that the losses occurred. (1T. at 143).

{¶47} Viewing the evidence in the case at bar in a light most favorable to the prosecution, we conclude that a reasonable person could have found beyond a reasonable doubt that appellant had committed the crimes of identity theft and misuse of a credit card in an amount more than $5,000.

{¶48} We hold, therefore, that the state met its burden of production regarding each element of the crimes and, accordingly, there was sufficient evidence to support appellant's convictions.

{¶49} As an appellate court, we neither weigh the evidence nor judge the credibility of witnesses. Our role is to determine whether there is relevant, competent and credible evidence upon which the fact finder could base its judgment. *Cross Truck v. Jeffries* (February 10, 1982), Stark App. No. CA-5758. “A fundamental premise of our criminal trial system is that ‘the *jury* is the lie detector.’ *United States v. Barnard,* 490

F.2d 907, 912 (C.A.9 1973) (emphasis added), cert. denied, 416 U.S. 959, 94 S.Ct. 1976, 40 L.Ed.2d 310 (1974). Determining the weight and credibility of witness testimony, therefore, has long been held to be the 'part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men.' *Aetna Life Ins. Co. v. Ward,* 140 U.S. 76, 88, 11 S.Ct. 720, 724-725, 35 L.Ed. 371 (1891)". *United States v. Scheffer* (1997), 523 U.S. 303, 313, 118 S.Ct. 1261, 1266-1267.

{¶50} Although appellant cross-examined the witnesses and argued that he had not used his father's identifying information to open the accounts, the weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. Jamison* (1990), 49 Ohio St.3d 182, certiorari denied (1990), 498 U.S. 881. The jury was free to accept or reject any and all of the evidence offered by the parties and assess the witness's credibility. "While the jury may take note of the inconsistencies and resolve or discount them accordingly * * * such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence". *State v. Craig* (Mar. 23, 2000), Franklin App. No. 99AP-739, citing *State v. Nivens* (May 28, 1996), Franklin App. No. 95APA09-1236 Indeed, the jurors need not believe all of a witness' testimony, but may accept only portions of it as true. *State v. Raver,* Franklin App. No. 02AP-604, 2003- Ohio-958, at ¶ 21, citing *State v. Antill* (1964), 176 Ohio St. 61, 67, 197 N.E.2d 548.; *State v. Burke,* Franklin App. No. 02AP-1238, 2003-Ohio-2889, citing *State v. Caldwell* (1992), 79 Ohio App.3d 667, 607 N.E.2d 1096. Although the evidence may have been circumstantial, we note that circumstantial evidence has

the same probative value as direct evidence. *State v. Jenks* (1991), 61 Ohio St. 3d 259, 574 N.E. 2d 492.

{¶51} After reviewing the evidence, we cannot say that this is one of the exceptional cases where the evidence weighs heavily against the convictions. The jury did not create a manifest injustice by concluding that appellant was guilty of the crimes of burglary and violating a protection order. We conclude the trier of fact, in resolving the conflicts in the evidence, did not create a manifest injustice to require a new trial. The jury heard the witnesses, evaluated the evidence, and was convinced of appellant's guilt.

{¶52} Appellant's second and fourth assignments of error are overruled.

III.

{¶53} In his third assignment of error, appellant argues the trial court erred in excluding the deputy sheriff's supplemental report from admission into evidence. Specifically, the defense sought to show the jury that the report did not contain the statements made by appellant that the deputy had testified to on direct examination.

{¶54} In *Rigby v. Lake County* (1991), 58 Ohio St.3d 269, 271, 569 N.E.2d 1056, 1058, the Supreme Court reaffirmed the longstanding test for appellate review of admission of evidence:

{¶55} "Ordinarily, a trial court is vested with broad discretion in determining the admissibility of evidence in any particular case, so long as such discretion is exercised in line with the rules of procedure and evidence. The admission of relevant evidence pursuant to Evid.R. 401 rests within the sound discretion of the trial court. E.g., *State v. Sage* (1987), 31 Ohio St.3d 173, 31 OBR 375, 510 N.E.2d 343, paragraph

two of the syllabus. An appellate court that reviews the trial court's admission or exclusion of evidence must limit its review to whether the lower court abused its discretion. *State v. Finnerty* (1989), 45 Ohio St.3d 104, 107, 543 N.E.2d 1233, 1237. As this court has noted many times, the term 'abuse of discretion' connotes more than an error of law; it implies that the court acted unreasonably, arbitrarily or unconscionably. E.g., *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 5 OBR 481, 482, 450 N.E.2d 1140, 1142.

{¶56} A reviewing court should be slow to interfere unless the court has clearly abused its discretion and a party has been materially prejudiced thereby. *State v. Maurer* (1984), 15 Ohio St.3d 239, 264, 473 N.E.2d 768, 791. The trial court must determine whether the probative value of the evidence and/or testimony is substantially outweighed by the danger of unfair prejudice, or of confusing or misleading the jury. See *State v. Lyles* (1989), 42 Ohio St.3d 98, 537 N.E.2d 221.

{¶57} Although both parties have purported to attach the deputy's supplemental report to their respective briefs, it does not appear that either party proffered the police report into evidence. In *State v. Hooks* (2001), 92 Ohio St.3d 83, 2001-Ohio-150, 748 N.E.2d 528, the Court noted: "[h]owever, a reviewing court cannot add matter to the record before it that was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter. See, *State v. Ishmail* (1978), 54 Ohio St. 2d 402, 8 O.O.3d 405, 377 N.E.2d 500. It is also a longstanding rule "that the record cannot be enlarged by factual assertions in the brief." *Dissolution of Doty v. Doty* (Feb. 28, 1980), Pickaway App. No. 411, citing *Scioto Bank v. Columbus Union Stock Yards* (1963), 120 Ohio App. 55, 59. Appellant's new material may not be considered.

See, *North v. Beightler*, 112 Ohio St. 3d 122, 2006-Ohio-6515, 858 N.E. 2d 386, ¶ 7, quoting *Dzina v. Celebrezze*, 108 Ohio St.3d 385, 2006-Ohio-1195, 843 N.E.2d 1202, ¶ 16.

{¶58} In the alternative, we would note that the record in appellant's case does not support a finding that he was prejudiced by the exclusion of the report.

{¶59} Crim.R. 52(A), which governs the criminal appeal of a non-forfeited error, provides that "[a]ny *error* * * * which does not *affect substantial rights* shall be disregarded."(Emphasis added.) Thus, Crim.R. 52(A) sets forth two requirements that must be satisfied before a reviewing court may correct an alleged error. First, the reviewing court must determine whether there was an "error"-i.e., a "[d]eviation from a legal rule." *United States v. Olano* (1993), 507 U.S. 725, 732-733, 113 S.Ct. 1770. Second, the reviewing court must engage in a specific analysis of the trial court record-a so-called "harmless error" inquiry-to determine whether the error "affect[ed] substantial rights" of the criminal defendant. In *U.S. v. Dominguez Benitez* (2004), 542 U.S. 74, 124 S.Ct. 2333, 159 L.Ed.2d 157, the Court defined the prejudice prong of the plain error analysis. "It is only for certain structural errors undermining the fairness of a criminal proceeding as a whole that even preserved error requires reversal without regard to the mistake's effect on the proceeding. See *Arizona v. Fulminante,* 499 U.S. 279, 309-310 (1991) (giving examples). "Otherwise, relief for error is tied in some way to prejudicial effect, and the standard phrased as 'error that affects substantial rights,' used in Rule 52, has previously been taken to mean error with a prejudicial effect on the outcome of a judicial proceeding. See *Kotteakos v. United States,* 328 U.S. 750 (1946). To affect "substantial rights," see 28 U.S.C. § 2111, an error must have "substantial and injurious

effect or influence in determining the ... verdict." *Kotteakos,* supra, at 776."124 S.Ct. at 2339. See, also, *State v. Barnes* (2002), 94 Ohio St.3d 21, 759 N.E.2d 1240. See, also, *State v. Fisher,* 99 Ohio St.3d 127, 129, 2003-Ohio-2761 at ¶ 7, 789 N.E.2d 222, 224-225. Thus, a so-called "[t]rial error" is "error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Fulminante,* 499 U.S. at 307-308, 111 S.Ct. 1246, 113 L.Ed.2d 302; *State v. Ahmed*, Stark App. No. 2007-CA-00049, 2008-Ohio-389 at ¶23-24.

{¶60} "When a claim of harmless error is raised, the appellate court must read the record and decide the probable impact of the error on the minds of the average juror." *State v. Young* (1983), 5 Ohio St.3d 221, 226, 450 N.E.2d 1143 (citing *Harrington v. California* (1969), 395 U.S. 250, 254, 89 S.Ct. 1726, 23 L.Ed.2d 284).

{¶61} Appellant was permitted to utilize the report to cross-examine Deputy Patrlja. Appellant had the opportunity to cross-examine him regarding any errors or omissions in his investigation. In fact, defense counsel vigorously cross-examined Deputy Patrlja about his failure to record or otherwise document the admissions made by the appellant during the interview.

{¶62} Accordingly, we find no manifest injustice occurred. We therefore find no reasonable possibility had the jury been permitted to see the supplemental report of Deputy Patrlja they would have found appellant not guilty, and hold that any error committed was harmless beyond a reasonable doubt. *State v. Lytle* (1976), 48 Ohio

St.2d 391, 403, 358 N.E.2d 623, 630-631, vacated on other grounds (1978), 438 U.S. 910, 98 S.Ct. 3135, 57 L.Ed.2d 1154.

{¶63} Appellant's third assignment of error is overruled.

{¶64} Accordingly, the judgment of the Court of Common Pleas, Richland County, Ohio is affirmed.

By Gwin, P.J.,

Hoffman, J., and

Wise, J., concur

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HON. W. SCOTT GWIN

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HON. WILLIAM B. HOFFMAN

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HON. JOHN W. WISE

WSG:clw 0601

[Cite as *State v. Conley*, 2009-Ohio-2903.]

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
MICHAEL JASON CONLEY	:	
Defendant-Appellant	:	CASE NO. 2009-CA-19

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

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HON. W. SCOTT GWIN

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HON. WILLIAM B. HOFFMAN

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HON. JOHN W. WISE