[Cite as *State v. Jenkins*, 2009-Ohio-6254.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
STATE OF OHIO	:	Sheila G. Farmer, P.J.
	:	John W. Wise, J.
Plaintiff-Appellee	:	Julie A. Edwards, J.
	:	
-vs-	:	Case No. 2008 CA 00191
	:	
	:	
ZABE JOHN JENKINS	:	O P I N I O N
Defendant-Appellant		

CHARACTER OF PROCEEDING:	Criminal Appeal from Stark County Court of Common Pleas Case No. 2007 CR 1903
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	November 23, 2009

APPEARANCES:

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Edwards, J.

{¶1} Appellant, Zabe John Jenkins, appeals a judgment of the Stark County Common Pleas Court convicting him of aggravated murder (R.C. 2903.01(B)), aggravated burglary (R.C. 2911.11(A)(2)), aggravated robbery (R.C. 2911.01(A)(1)) and kidnapping (R.C. 2905.01(A)(2)), with accompanying firearm specifications (R.C. 2941.145). Appellee is the State of Ohio.

STATEMENT OF FACTS AND CASE

{¶2} During the summer of 2007, appellant hung out at the Chips Apartment Complex [hereinafter "Chips"] with his friends Elvis "Kwan" Wooten, Raymond Byrd and Michael "Big Mike" or "Big Titties" Hall. Appellant's street name was "Boog." Byrd and Hall are cousins. Appellant and Kwan purchased marijuana from Antwon Hight and Steven Hight, Jr. The Hight brothers sold marijuana from the home they shared with their father, Steven "Hondo" Hight, Sr., at 2311 – 20th St. NE in Canton, Ohio. Kwan sometimes took his friend Latoya Rutledge to purchase marijuana at the Hight residence.

{¶3} On June 20, 2007, Kwan gathered his friends to help him rob the Hight home. Appellant called Byrd and told him he "got a lick for some weed," meaning a robbery for marijuana. Tr. 668-69. Byrd put a .20 gauge shotgun down his pants leg and a .32 caliber handgun in his pocket and walked to Chips.

{¶4} Appellant, Byrd, Kwan, Hall and Rutledge gathered at Chips. Appellant carried a P-89 .9 millimeter semi-automatic handgun. The men wore dark clothing and dark bandanas as masks covering their faces. Kwan informed the group of his plan to

rob the Hight home. Latoya Rutledge drove the men to the Hight home in her silver Pontiac Grand Am and parked about a block away.

{¶5} Steven Hight, Jr. and Antwon Hight were night fishing at Berlin Lake. Byrd, Hall, and appellant walked to the house and Byrd knocked on the door. When Steven Hight, Sr. answered the door, Hall and appellant rushed him, and put him on the couch with a blanket over his head. Hall held Hight at gunpoint using appellant's gun while Byrd and appellant ransacked the house. Byrd found "a couple of hundreds" in one of the bedrooms, which he pocketed. He came out of the bedroom to find appellant and Hight in the bathroom. The men bound Hight with duct tape. They found marijuana under the bathroom sink. Appellant and Byrd heard a knock at the door and decided to rob whoever was at the door. They told Hall to go back to the car because he was too large to get away quickly if there was a problem.

{¶6} Earlier Bob Hight called his brother, Steven Hight, Sr. While they were talking, Bob heard arguing and heard Steven say, "They're here." Bob heard the phone drop. When he tried to call back, no one answered.

{¶7} Bob's daughter's boyfriend, Ryan Rider, was smoking a cigarette on Bob's porch. Bob told Rider that Steve was getting jumped and they needed to go help him. The men took two metal canes and drove to Steven's house.

{¶8} When Rider pulled into the driveway he saw three people run through the backyard. Bob was in poor health and stayed in the car while Rider went to the side door and knocked. Rider saw the kitchen light go out and heard the deadbolt lock turn in the door. Rider yelled for Steve. He then heard Bob speak. When Rider turned toward the car to look in Bob's direction, Rider saw Byrd standing behind him with the

shotgun held to his head. A man was standing beside the car with a gun pointed at Bob's head. Byrd told Rider to put down the cane he was holding and walk to the back of the house.

{¶9} The man holding the gun on Bob Hight had a high-pitched, squeaky voice. Kwan has a high-pitched, unusual voice. The man holding the gun on Bob said, "This is your fucking day." Tr. 902.

{¶10} As Rider began walking to the back of the house, Hight burst through the side door and grabbed the barrel of Byrd's shotgun. Byrd pulled the trigger and discharged the gun, but Hight wrestled the gun away from Byrd. Hight turned the gun on Byrd, who threw a pair of shoes he had stolen from the house at Hight and ran. Rider ran as well, intending to go to a neighbor's house for help. Before he could knock on a neighbor's door, he heard footsteps and saw two men chasing him. One of them had a handgun and told Rider to run. As he ran, the man shot at him three times.

{¶11} Hall arrived back at the car to discover Wooten and Rutledge waiting. Hall heard 4-5 gunshots after he got in the car. Byrd arrived at the car next, followed by appellant. When appellant got in the car he said, "I think I hit him." Tr. 676, 746-747. The group went back to Chips where they divided the marijuana they stole from the Hight home.

{¶12} Jason Ramey was watching a movie in his home on 22nd Street, near the Hight home. He heard gunshots and looked out the window. He saw two people running through the yard toward a Pontiac Grand Am. The people jumped in the car, and the car sped away.

{¶13} Canton police arrived to find Steven Hight, Sr. lying dead in the driveway. The officers secured the scene and began looking for evidence. Officers found three shell casings in the driveway from a .9 millimeter weapon. A shotgun was lying near Hight's body. From the driveway officers also recovered a digital scale, a pair of Fila tennis shoes and a bag containing two small baggies of marijuana. Officers noted bullet holes on the home.

{¶14} Inside, the home was in a state of disarray. Drawers were removed and dumped and cushions were removed from the sofa.

{¶15} The next day officers found an additional .9 millimeter shell casing in the grass near the driveway and three .9 millimeter shell casings in the location where Rider said he had been shot at three times.

{¶16} The autopsy of Hight's body revealed that he had been shot three times, each shot being fatal. He was shot once in the back, once in the chest which nearly severed his heart, and once in the forehead, transecting his brain.

{¶17} Canton Police Sgt. Victor George investigated the homicide. The day after the murder the Hight brothers gave George the name "Kwan" as a potential suspect. Both boys had sold marijuana to Kwan. Bob Hight had described the attackers as African-American, and Kwan was one of the few African-Americans to whom the boys sold marijuana. After further investigation, George identified the suspects in Hight's murder as Elvis "Kwan" Wooten, Latoya Rutledge, Michael Hall, Raymond Byrd and appellant. When George spoke to appellant he denied any knowledge of the incident. George asked appellant if he knew Byrd. He admitted that he did and picked Byrd's picture out of a photo array. George noted that when speaking

to appellant, appellant's heart was pounding so hard that it was noticeable through his shirt.

{¶18} Appellant was indicted by the Stark County Grand Jury with one count of aggravated murder or aiding and abetting aggravated murder, one count of aggravated robbery or aiding and abetting aggravated robbery, one count of aggravated burglary or aiding and abetting aggravated burglary and one count of kidnapping or aiding and abetting kidnapping. The aggravated murder charged carried death specifications which charged appellant with being the principal offender, or having committed the murder with prior calculation and design while committing or attempting to commit aggravated robbery, aggravated burglary and kidnapping. All four charges carried firearm specifications.

{¶19} Michael Hall and Raymond Byrd were each charged with complicity to aggravated robbery, complicity to aggravated burglary, complicity to kidnapping and three firearm specifications. They each entered pleas of guilty, and in exchange for their testimony against appellant, Wooten and Rutledge were sentenced to fifteen years incarceration.

{¶20} Elvis Wooten was convicted of complicity to aggravated robbery and complicity to aggravated burglary following jury trial. His convictions were affirmed by this court. *State v. Wooten*, Stark App. No. 2008CA00103, 2009-Ohio-1863. Latoya Rutledge was convicted of complicity to aggravated burglary, complicity to aggravated robbery and complicity to kidnapping. Two of the convictions carried firearm specifications. Her conviction was affirmed by this Court. *State v. Rutledge*, Stark App. No. 2009CA0022, 2009-Ohio-2478.

{¶21} Appellant's case proceeded to jury trial. He was convicted of aggravated murder, aggravated robbery, aggravated burglary and kidnapping. He was acquitted of the death penalty specifications, the jury finding that he was neither the principal offender nor did he murder Steven Hight, Sr. with prior calculation or design. The jury found him guilty of all four firearm specifications.

{¶22} For aggravated murder, appellant was sentenced to life in prison without parole eligibility for twenty years, and an additional three years for the firearm specification. He was sentenced to eight years incarceration on each of the remaining convictions, to be served consecutively to each other and consecutively to the aggravated murder sentence. The remaining three firearm specifications were merged for a total term of life imprisonment with a possibility of parole after 47 years. Appellant assigns six errors on appeal:

{¶23} "I. THE VERDICT OF THE JURY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND THE TRIAL COURT'S FINDING OF GUILTY WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE.

{¶24} "II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY SUSTAINING THE STATE'S OBJECTION TO A PROPER QUESTION BY DEFENSE COUNSEL TO WITNESS RAYMOND BYRD IN VIOLATION OF THE APPELLANT'S FEDERAL AND STATE CONSTITUTIONAL RIGHT TO A FAIR TRIAL AND HIS RIGHT TO CONFRONT THE WITNESSES AGAINST HIM.

{¶25} "III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY SUSTAINING THE STATE'S PEREMPTORY CHALLENGE OF JUROR NO. 420 AND BY DENYING APPELLANT'S OBJECTION TO SAID CHALLENGE SINCE THE

CHALLENGE WAS EXERCISED IN A DISCRIMINATORY MANNER IN VIOLATION OF APPELLANT'S RIGHT TO EQUAL PROTECTION OF THE LAW GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 2 OF THE OHIO CONSTITUTION.

{¶26} "IV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND THE APPELLANT WAS DENIED HIS RIGHT TO A FAIR AND IMPARTIAL JURY AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION BY THE CUMULATIVE EFFECT OF ALLOWING TWO JURORS WHO HAD SOME ASSOCIATION WITH THE ALLEGED VICTIM, THE VICTIM'S FAMILY AND THE LEAD DETECTIVE IN THIS MATTER TO SERVE AS JURORS.

{¶27} "V. THE APPELLANT WAS DENIED HIS RIGHT TO A FAIR TRIAL AND TO DUE PROCESS OF LAW BY THE PROSECUTION'S MISCONDUCT IN NOT DISCLOSING TO APPELLANT'S COUNSEL EVIDENCE FAVORABLE TO THE DEFENSE AND BY THE TRIAL COURT IN NOT ORDERING SUCH DISCLOSURE AFTER AN IN-CAMERA INSPECTION OF SAID EVIDENCE.

{¶28} "VI. THE APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL AND TO DUE PROCESS OF LAW BY THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY THAT THE STATE MUST PROVE A CULPABLE MENTAL STATE AS AN ESSENTIAL ELEMENT IN AIDING OR ABETTING ANOTHER IN A CRIMINAL OFFENSE."

I

{¶29} In his first assignment of error, appellant challenges his convictions as against the manifest weight and sufficiency of the evidence.

{¶30} In determining whether a verdict is against the manifest weight of the evidence, the appellate court acts as a thirteenth juror and "in reviewing the entire record, 'weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether in resolving conflicts in evidence 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*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541, 1997-Ohio-52, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

{¶31} An appellate court's function when reviewing the sufficiency of the evidence is to determine whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 251, paragraph two of the syllabus.

{¶32} Appellant was convicted of aggravated murder, aggravated robbery, aggravated burglary, kidnapping and four gun specifications. In order to convict appellant of aggravated murder, the State needed to prove that he purposely caused the death of Steven Hight, Sr. while fleeing immediately after committing or attempting to commit aggravated robbery, aggravated burglary or kidnapping, or that he aided and abetted another in doing so. R.C. 2903.01(B). To prove aggravated robbery, the State had to show that appellant did knowingly attempt or commit a theft offense, or in fleeing

immediately after the attempt or offense, did have a deadly weapon under his control and that he brandished it, displayed it or indicated he possessed it, or he aided and abetted another in so doing. R.C. 2911.01(A)(1). To prove aggravated burglary, the State needed to prove that appellant knowingly trespassed into the occupied Hight residence by force, stealth or deception in order to commit a theft offense while he had a deadly weapon under his control, or aided and abetted another in doing so. R.C. 2911.11(A)(2). Finally, to prove kidnapping, the State needed to prove that appellant restrained the liberty of Hight by force, threat or deception with purpose to facilitate the commission of a felony or flight thereafter, and that Hight was not released in a safe place unharmed, or that appellant aided and abetted the kidnapping. R.C. 2905.01(A)(2). For each offense, the state had to prove that appellant had a firearm and displayed or used it to facilitate the offense in order to convict appellant of the firearm specifications. R.C. 2941.145.

{¶33} Appellant does not argue that the State failed to prove a specific element or elements of any of the crimes. Rather, appellant's arguments focus on the inconsistencies in the testimony of Byrd and Hall, and the inconsistencies between their testimony at trial compared to their prior testimony at the co-defendants' trials and in their statements to the police. He argues that their testimony is not credible, and given that they are cousins, it is possible that they were falsely accusing appellant. He argues their attempts to protect Wooten and Rutledge during the investigation further add suspicion to their veracity in testifying that appellant played any role in these offenses.

{¶34} The state presented testimony that appellant called Byrd and told Byrd he had "a lick for some weed," meaning a robbery for marijuana. Byrd walked to Wooten's

apartment where he met up with appellant, Hall, Wooten and Rutledge, and Wooten explained the plan for the robbery. The men were wearing dark clothing and covered their faces with bandanas. Rutledge drove the group to the Hight residence. Appellant, Hall and Byrd entered the Hight home by force when they rushed Hight as he answered the door. The testimony established that none of them were invited or had permission to go into the house. Both Hall and Byrd testified that the appellant had a handgun. Hall said appellant's gun was a chrome semi-automatic and Byrd said it was a chrome semi-automatic P-89. Appellant gave Hall the P-89 and had him hold Hight on the sofa at gunpoint while he and Byrd ransacked the house, stealing marijuana, money and a pair of shoes. After Hight was moved to the bathroom, appellant again had possession of the P-89. In order to facilitate their flight after committing the burglary and robbery, Byrd held Hight down while appellant bound Hight's hands and feet with duct tape. Hight was not released in a safe place unharmed. He was killed in his driveway by a .9 millimeter weapon, most likely a Ruger P-89. Although appellant suggests that Byrd shot Hight with the handgun in his pocket, Byrd testified that while he and Hight wrestled for the shotgun, appellant was standing on the passenger side of Bob Hight's car with the P-89. Finally, when appellant arrived back at Rutledge's car, he told the others "I think I hit him."

{¶35} During trial, appellant suggested through argument and cross-examination of witnesses that it was either Byrd or Wooten who shot Hight. He makes the same argument to this court on appeal, arguing he was framed by Hall and Byrd. However, the jury did not find that appellant was the principal offender, thus necessarily finding he was an aider and abettor. Therefore, appellant's arguments regarding the sufficiency

and weight of the evidence as to who pulled the trigger are without merit, as evidence proved that appellant both aided and abetted in Hight's murder and was a part of the crimes leading up to the murder. The evidence demonstrated that appellant carried a .9 millimeter handgun when they drove to the Hight home. The evidence demonstrated that the victim was shot with a .9 millimeter weapon. From this evidence the jury could find that appellant's weapon was used in the murder, and appellant either fired the gun himself or gave the gun to one of the other participants in the crime.

{¶36} Viewing this evidence in a light most favorable to the prosecution, a rational trier of fact could have found that appellant used a firearm to commit burglary, robbery, kidnapping and aggravated murder at the Hight home or aided and abetted his co-defendants in doing so.

{¶37} In support of his manifest weight argument, appellant argues that the testimony of Hall and Byrd is not credible, focusing on their plea agreements, "slip-ups" and inconsistencies in their testimony, and their relationships with Rutledge and Wooten. All of this information, however, was presented to the jury. As this Court held considering the same argument in Wooten's appeal:

{¶38} "It is well settled minor inconsistencies in the testimony of witnesses do not render a conviction against the manifest weight of the evidence. A jury may 'take note of the inconsistencies and resolve or discount them accordingly.' It is equally well settled the issue of credibility is primarily a matter for the trier of fact to determine since the trier of fact is in the best position to judge the credibility of witnesses and the weight to be given the evidence." *Wooten*, supra, at ¶95.

{¶39} Appellant has not demonstrated from the record that the jury lost its way or was influenced by any improper motivations or considerations, such as passion, prejudice, or bias when it considered the evidence. The jury's verdict reflects an effort on the jury's part to assess and weigh the evidence because instead of convicting appellant as charged in the indictment, the jury found that the evidence did not establish by proof beyond a reasonable doubt that appellant was the principal offender, nor did the State prove to the jury beyond a reasonable doubt that he murdered Hight with prior calculation and design. None of the inconsistencies appellant points to in the testimony of Hall and Byrd relate to appellant's presence at the scene and his planning and participation in the crimes, but rather establish confusion as to who shot Hight. Byrd and Hall were both questioned regarding their plea agreements, admitting to entering into the agreements in an effort to avoid a life sentence for the murder of Hight. Both were cross-examined concerning prior statements and testimony concerning the crime. Byrd testified for the first time in appellant's trial that he had a handgun on him in addition to the shotgun. However, as appellant was not found to be the principal offender, his conviction could stand even if Byrd was the person who pulled the trigger. None of the inconsistencies in the testimony of Byrd and Hall place appellant anywhere other than at the scene of the crime as an active participant in the crimes committed in the Hall home.

{¶40} The first assignment of error is overruled.

II

{¶41} In his second assignment of error, appellant argues that the court erred in sustaining the State's objection to a question he asked of Byrd on cross-examination.

{¶42} On cross-examination, Byrd admitted that in addition to the shotgun, he had a handgun in his pocket. Following cross-examination of Byrd, the jury was given an opportunity to ask questions through the court. One juror asked what kind of gun Byrd had in his pocket and Byrd testified it was a .32. Another juror asked if he had fired the weapon in his pocket and Byrd testified he did not. Counsel for appellant then asked on re-cross, "When that man took that shotgun off you, you pulled out a .9 and shot him, didn't you?" Tr. 726. The state objected and the court sustained the objection.

{¶43} A defendant's right to cross-examine the State's witnesses is guaranteed by both the Confrontation Clause of the Sixth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution. *Douglas v. Alabama* (1965), 380 U.S. 415, 418, 85 S.Ct. 1074, 13 L.Ed.2d 934; *State v. Self* (1990), 56 Ohio St.3d 73, 78, 564 N.E.2d 446. As a general rule, cross-examination is permitted "on all relevant matters and matters affecting credibility." Evid. R. 611(B). The scope of cross-examination lies within the sound discretion of the trial court, viewed in relation to the particular facts of the case. *State v. Slagle* (1992), 65 Ohio St. 3d 597, 605, 605 N.E. 2d 916, 925. This exercise of discretion will not be reversed in the absence of a clear showing of an abuse of discretion. Id. An abuse of discretion implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140, 1142. A cross-examiner may ask a question if he or she has a good-faith belief that a factual predicate for the question exists. *State v. Gillard* (1988), 40 Ohio St.3d 226, 533 N.E.2d 272, ¶ 2 of the syllabus, abrogated on other grounds, *State v. McGuire*, 80 Ohio St.3d 390, 686 N.E.2d 1112, 1997-Ohio-335.

{¶44} Appellant has not demonstrated that the court abused its discretion in sustaining the objection. Forensic evidence established that Hight was shot with a .9 millimeter weapon. Byrd testified he had a .32 in his pocket but did not fire the weapon. Forensic evidence further showed that the shell casings and all three bullets extracted from Steven Hight's body were fired from the same weapon. There was no evidence that Byrd had a .9 millimeter weapon on his person, and there was no evidence that any of the bullets which killed the victim were fired from a .32. Based on the testimony presented prior to the question, nothing suggested that Byrd fired a .9 weapon. Furthermore, even if the question had been allowed and the answer had been "yes," appellant still could have been convicted as an aider or abettor. The court did not abuse its discretion in sustaining the objection to the question.

{¶45} The second assignment of error is overruled.

III

{¶46} In his third assignment of error, appellant argues that the State exercised its peremptory challenge of Juror 420 in a racially discriminatory manner in violation of *Batson v. Kentucky* (1986), 476 U.S. 79.

{¶47} A defendant is denied equal protection of the law guaranteed to him by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution when the state places the defendant on trial before a jury from which numbers of the defendant's race have been purposely excluded. *Strauder v. W. Virginia* (1880), 100 U.S. 303, 305; *State v. Hernandez* (1992), 63 Ohio St.3d 577; *State v. Bryant* (1995), 104 Ohio App.3d 512, 516. The equal protection clause forbids a prosecutor from challenging potential jurors solely on account of their race or on the

assumption that jurors of the same race as the defendant will be unable to impartially consider the state's case against the defendant. *Batson v. Kentucky*, supra, 476 U.S. at 89.

{¶48} When a party opposes a peremptory challenge by claiming racial discrimination, "[a] judge should make clear, on the record, that he or she understands and has applied the precise *Batson* test." *Hicks v. Westinghouse Materials Co*., supra, 78 Ohio St.3d at 99.

{¶49} In *Hicks*, supra, the Ohio Supreme Court set forth the *Batson* test as follows:

{¶50} "The United States Supreme Court set forth in *Batson*, the test to be used in determining whether a peremptory strike is racially motivated. First, a party opposing a peremptory challenge must demonstrate a prima-facie case of racial discrimination in the use of the strike. Id. at 96, 106 S.Ct. at 1723, 90 L.Ed.2d at 87. To establish a prima-facie case, a litigant must show he or she is a member of a cognizable racial group and that the peremptory challenge will remove a member of the litigant's race from the venire. The peremptory-challenge opponent is entitled to rely on the fact that the strike is an inherently 'discriminating' device, permitting 'those to discriminate who are of a mind to discriminate'. *State v. Hernandez* (1992), 63 Ohio St.3d 577, 582, 589 N.E.2d 1310, 1313, certiorari denied (1992), 506 U.S. 898, 113 S.Ct. 279, 121 L.Ed.2d 206. The litigant must then show an inference of racial discrimination by the striking party. The trial court should consider all relevant circumstances in determining whether a prima-facie case exists, including all statements by counsel exercising the peremptory challenge, counsel's questions during voir dire, and whether a pattern of strikes against

minority venire members is present. See, *Batson* at 96-97, 106 S.Ct. at 1723, 90 L.Ed.2d at 88. Assuming a prima-facie case exists, the striking party must then articulate a race-neutral explanation 'related to the particular case to be tried.' Id. at 95, 106 S.Ct. at 1724, 90 L.Ed.2d at 88. A simple affirmation of general good faith will not suffice. However, the explanation 'need not rise to the level justifying exercise of a challenge for cause.' Id. at 97,106 S.Ct. at 723, 90 L.Ed.2d at 88. The critical issue is whether a discriminatory intent is inherent in counsel's explanation for use of the strike; intent is present if the explanation is merely pretext for exclusion on the basis of race. *Hernandez v. New York* (1991), 500 U.S. 352, 363, 111 S.Ct. 1859, 1868, 114 L.Ed.2d 395, 409.78 Ohio St.3d. 98-9.

{¶51} Although the prosecutor must present a comprehensible reason, "[t]he second step of this process does not demand an explanation that is persuasive or even plausible"; so long as the reason is not inherently discriminatory, it suffices. *Purkett v. Elem* (1995), 514 U.S. 765, 767-768, 115 S.Ct. 1769. (per curiam); *Rice v. Collins* (2006), 546 U.S. 333, 126 S.Ct. 969, 973-74.

{¶52} Finally, the trial court must determine whether the party opposing the peremptory strike has proved purposeful discrimination. *Purkett*, supra, at 766-767, 115 S.Ct. 1769, 1770. At this stage that the persuasiveness and credibility of the justification offered by the party making the peremptory challenge becomes relevant. Id. at 768, 115 S.Ct. at 1771. The critical question, which the trial judge must resolve, is whether counsel's race-neutral explanation should be believed. *Hernandez v. New York*, 500 U.S. at 365, 111 S.Ct. at 1869; *State v. Nash* (August 14, 1995), Stark County App. No. 1995-CA-00024. This final step involves evaluating "the persuasiveness of the

justification" proffered by the prosecutor, but "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *Purkett*, supra, at 768, 115 S.Ct. 1769; *Rice v. Collins*, supra, at 126 S.Ct. 974.

{¶53} On direct appeal in federal court, the credibility findings a trial court makes in a *Batson* inquiry are reviewed for clear error. *Hernandez v. New York* (1991), 500 U.S. 352, 364-366, 111 S.Ct. 1859, 114 L.Ed.2d . This Court has previously relied on Justice Breyer's concurring opinion in *Rice v. Collins*, supra, in considering the standard of review to be applied to a court's credibility findings on a *Batson* claim:

{¶54} "The trial judge is best placed to consider the factors that underlie credibility: demeanor, context, and atmosphere. And the trial judge is best placed to determine whether, in a borderline case, a prosecutor's hesitation or contradiction reflect (a) deception, or (b) the difficulty of providing a rational reason for an instinctive decision. Appellate judges cannot on the basis of a cold record easily second-guess a trial judge's decision about likely motivation. These circumstances mean that appellate courts will, and must, grant the trial courts considerable leeway in applying *Batson*." *Rutledge*, supra, at ¶142, citing *Rice v. Collins*, supra at 126 S.Ct. at 977. (Breyer, J., concurring).

{¶55} Initially, Juror 420 stated in response to questioning from the court that she was religiously, morally or otherwise against the imposition of the death penalty, but could follow the law even though she was opposed to the death penalty. Tr. 228. The State questioned Juror 420 further on this issue:

{¶56} "MR. VANCE: I think from your questionnaire you gave a couple of mixed responses. You gave one in your questionnaire response. I think your questionnaire

said you had circled the box or the letter that said not ever is the death penalty appropriate punishment as I am opposed to the death penalty under all circumstances. Is that right?

{¶57} "JUROR NO. 420: Yes…

{¶58} "JUROR NO. 420: I am a little iffy about it. It wouldn't be my first - - I guess I never thought to give somebody the death penalty. Never been in a position where I had to really think about it. I'm not going to protest where I am so against it, just I'm not really sure if I am for it.

{¶59} "MR. VANCE: That I know is completely putting you on the spot, the nature of this proceeding, and I won't say that I don't mean to because obviously I do or I wouldn't be asking you these questions…. So we got to know where we could possibly be before we can get started. Do you understand what I mean? So you had marked this on your questionnaire. That's why it seems like I am picking on you, then you had written down I don't believe in the death penalty and then when the judge asked you the question before if you have objections to the death penalty, and you said that you did, then you also said that you can follow the law. There are kind of some contradictions there…

{¶60} "MR. VANCE: And there aren't any right or wrong answers here. And I guess I'm asking you what your position is?

{¶61} "JUROR NO. 420: I believe I could listen to the instructions and follow that. Just wasn't my first choice I guess.

{¶62} "MR. VANCE: I can see that you are definitely struggling with this and we all want to do the right thing. We all want to make the right choices. I can't tell you what

those choices are. I can tell by looking at you now that you are kind of struggling with this; is that fair to say?

{¶63} "JUROR NO. 420: Yes.

{¶64} "MR. VANCE: You had also indicated in one of your other responses that you wouldn't feel comfortable making that decision. Does that have to do with your beliefs about the death penalty?

{¶65} "JUROR NO. 420: I just wouldn't - - I don't know if I can feel comfortable making that decision to take someone else's life, whether right or wrong. I'm not sure. I wouldn't feel right. I wouldn't be the first person saying yes, go for the death penalty." Tr. 233-236.

{¶66} Further, earlier in the questioning by defense counsel, Juror 420 stated that it would "bother" her if appellant did not testify. Tr. 144. She stated that she would "be a little suspicious why he's not up there." Id.

{¶67} The state challenged Juror 420 for cause and the court overruled the challenge. At the time the state made the challenge for cause, the state asked the record to reflect that the juror was visibly upset, and the court noted, "That's a correct observation." Tr. 247. The state later exercised a peremptory challenge on Juror 420, to which counsel for appellant raised a *Batson* challenge. The court overruled the motion after the state placed its racially-neutral explanation for use of the challenge on the record:

{¶68} "MR. VANCE: Judge, I don't think there has been any prima facia showing - - first of all, the record should reflect that this juror is an African-American, that the Defendant is African-American. I think that during the death penalty qualifications stage

that there were certainly occasions during that stage that she indicated would be more than reluctant to follow the Court's instructions. In fact, she was visibly upset as the Court indicated anyone would be. She was crying. She was upset. She made indications during general voir dire that if my memory or my notes are correct, that she would want potentially more than beyond a reasonable doubt. She said that she may want to hear from the Defendant and that that may stick in her mind. I believe that those are reasons that would warrant a removal of this juror.

{¶69} "THE COURT: Mr. Jakmides.

{¶70} "MR. JAKMIDES: Your Honor, actually it was not her that expressed the opinion that she might want more proof. That was Juror 411.

{¶71} "THE COURT: Well, the issue is whether or not - - this isn't a challenge for cause. This is a peremptory challenge. Counsel is required to give a race neutral basis. I anticipated this may come up and the fact of the matter is she did indicate that if the Defendant did not testify she would have trouble with that. But the primary reason that I am going to okay this is because there was a close call on cause.

{¶72} "She ultimately did indicate the magic question that she felt she could, in fact, follow the Court's instructions not withstanding it was very, very difficult for her to vote to impose the death penalty. But she did give enough concern that certainly would give rise to the State wanting to excuse any juror regardless of the race that was that reluctant to vote for the death penalty." Tr. 238-430.

{¶73} Appellant correctly notes in his brief that the State was mistaken in claiming that Juror 420 wanted more than proof beyond a reasonable doubt. However, the reason given by the court on the record for accepting the State's racially-neutral

explanation was the juror's continuing struggle with her ability to impose the death penalty despite her "correct" answer to the ultimate question of whether she could follow the law. The record reflects that the witness was crying and visibly upset. The trial court is not only in a better position than this court to observe the demeanor of the prosecutor and judge credibility, but is also in a better position than this court to consider the demeanor of the juror in question and her ability to follow the law in spite of her issues with the death penalty. The court noted that it was a "close call" on the state's challenge for cause.

{¶74} Appellant also argues that the State's reliance on her difficulty with appellant not testifying on his own behalf is not an explanation for removing her because ultimately this would inure to the benefit of the State, not the defense. However, the issue of her concern with appellant not testifying highlights this juror's struggles in several areas with her ability to follow the law as given by the court.

{¶75} Finally, appellant argues that the State did not remove two other jurors who expressed reservations against the death penalty, Juror 392 and Juror 450. Appellant relies on *State v. Belcher* (1993), 89 Ohio App.3d 24, 623 N.E.2d 583. In *Belcher*, the 10th District Court of Appeals held that a prosecutor's explanation for striking an African-American juror does not pass muster where a similarly situated Caucasian juror was not stricken. Id. at 33-34, citing *Garrett v. Morris* (C.A. 8, 1987), 815 F.2d 509, 513-14.

{¶76} The record does not reflect that Juror 392 and Juror 450 were Caucasian. Further, the record reflects that these jurors did not voice difficulty with imposing the death penalty as clearly as Juror 420, nor does the record reflect either was visibly

distraught over the issue. The following colloquy occurred between the prosecutor and Juror 392:

{¶77} "MR. VANCE: Juror 392, I think you indicated that life without parole is usually better than the death penalty is usually not okay.

{¶78} "JUROR NO. 392: That's the way I feel, yes.

{¶79} "MR. VANCE: And - -

{¶80} "JUROR NO. 392: I would certainly agree there are circumstances where that would be the case. I am not sure if this is one of them.

{¶81} "MR. VANCE: You have to hear the evidence?

{¶82} "JUROR NO. 392: Certainly all the circumstances. I don't know now.

{¶83} "MR. VANCE: Fair to say you can keep an open mind?

{¶84} "JUROR NO. 392: I could do that, but I would feel that it would have to be something that would really convince me that was the appropriate thing.

{¶85} "MR. VANCE: When you say really convince you, but you would be able to follow the law?

{¶86} "JUROR NO. 392: I can attempt to do that, yes.

{¶87} "MR. VANCE: When you say - - again I hate to parse words, but you say attempt to do that, it's hard for us to deal with attempt to do so.

{¶88} "JUROR NO. 392: I can say sure I will try to follow the law and it would be the way I interpret the law. I am trying to interpret it correctly. But doesn't mean we are all going to interrupt (sic) it exactly the same way." Tr. 196-197.

{¶89} The following colloquy occurred between the prosecutor and Juror 450:

{¶90} "If the State of Ohio proves by proof beyond a reasonable doubt that those aggravating circumstances outweigh any mitigating factors by proof beyond a reasonable doubt then death shall be the sentence. Juror 450, can you do that?

{¶91} "JUROR NO. 450: Yes.

{¶92} "MR. VANCE: You indicated on your questionnaire that you're opposed to the death penalty.

{¶93} "JUROR NO. 450: Yes.

{¶94} "MR. VANCE: You told the judge that you are opposed, and he followed that up with an appropriate question. You said that you can still follow the law despite your opposition?

{¶95} "JUROR NO. 450: Yes." Tr. 267.

{¶96} The record does not reflect that these jurors had the same emotional reaction to imposing the death penalty as Juror 420. Appellant has not demonstrated that the court erred in accepting the prosecutor's racially neutral explanation for the challenge of Juror 420.

{¶97} The third assignment of error is overruled.

IV

{¶98} Appellant argues in his fourth assignment of error that the court erred in allowing two jurors to remain on the panel after they disclosed acquaintances with persons involved in the case.

{¶99} After the jury was sworn but before the state began presentation of its case in chief, Juror 437 brought to the court's attention that she met the victim about three years ago. She stated that her "best friend's nephew used to go out with his

granddaughter's mother." Tr. 503. She had been introduced to the victim but stated that nothing about that meeting would impact her ability to be fair. Tr. 503. The juror further stated that she met another family member and could not remember the person's name, but might remember the face if this person testified. She again stated that this would have no impact on her ability to be fair, she just wanted the court to know everything. Tr. 504. Counsel for appellant did not ask for this juror to be removed and stated on the record that he was satisfied that the court made an appropriate examination of the juror and resolved any concerns. Tr. 505.

{¶100} Juror 417 approached the court after Sgt. Victor George testified for the state. She recognized George's face when he testified because his son and her daughter were friends. She stated that "last year" she had talked to George at a school function and discovered that he's a cousin of one of her friends, but she did not know George personally. Tr. 876. She stated that her past dealings with George would have no impact on how she judged his credibility as a witness. Tr. 878. Counsel for appellant requested that this juror be replaced with an alternate and the court overruled the request.

{¶101} Fairness requires impartial, indifferent jurors, but jurors need not be totally ignorant of the issues involved in the case. *State v. Sheppard*, 84 Ohio St.3d 230, 235, 703 N.E.2d 286, 1998-Ohio-323, citing *Murphy v. Florida* (1975), 421 U.S. 794, 799-800, 95 S.Ct. 2031, 2036, 44 L.Ed.2d 589, 594-595. The fact that a prospective juror knew the victim of an offense or had previously met the accused is not per se a dismissal for cause. Id. The trial court has discretion to determine a juror's ability to be partial. Id.

{¶102} In *State v. Kelly* (1994), 93 Ohio App. 3d 257, 638 N.E.2d 153, this Court considered a case where after the jury was sworn and the child victims had testified, a juror recognized one of the victims as a child from her class at church. The juror stated that she could be fair and impartial and had not formed any opinion about the truthfulness of the victims from her acquaintance with them. We found no abuse of discretion in the trial court denying appellant's challenge for cause. Id. at 270.

{¶103} In the instant case, both jurors stated unequivocally that their past dealings with persons involved in the case would have no effect on their ability to be fair and impartial. Juror 437 met the victim on one occasion three years before trial, and counsel for appellant stated on the record that he had no objection to the juror remaining seated on the panel. Juror 417 did not recognize Sgt. George's name, but recognized his face from a meeting at the school the year before. She stated that her daughter and George's son were not close, that nothing in the past meeting would affect the way in which she judged his credibility, and that if the case resulted in a not guilty verdict it would not make her uncomfortable to see George at a school function. Appellant has not demonstrated that the court abused its discretion in allowing both jurors to remain on the panel.

{¶104} Appellant argues that the cumulative effect of allowing these jurors to remain on the panel coupled with the *Batson* error alleged in Assignment of Error 3 resulted in a denial of his right to a fair trial. Appellant cites *State v. DeMarco* (1987), 31 Ohio St.3d 191, 509 N.E.2d 1256, ¶2 of the syllabus, for the proposition that although violations of the Rules of Evidence during trial may singularly not rise to the level of prejudicial error, a conviction will be reversed where the cumulative effect of the errors

deprived the defendant of the constitutional right to a fair trial. The *DeMarco* case involved numerous violations of the hearsay rule, which the Supreme Court found cumulatively resulted in prejudicial error. Id. at 196-197. However, the doctrine is not applicable to cases where the court has not found multiple instances of harmless error. *State v. Garner*, 74 Ohio St.3d 49, 64, 656 N.E.2d 623, 1995-Ohio-168. In the instant case, we have found no error, harmless or otherwise, in the court's rulings concerning Jurors 420, 417, and 437. Accordingly, the cumulative error doctrine does not apply.

{¶105} The fourth assignment of error is overruled.

V

{¶106} In his fifth assignment of error, appellant argues that the prosecutor committed misconduct by failing to disclose evidence favorable to the defense contained in the statement Robert Hight gave to the police, in violation of *Brady v. Maryland* (1963), 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215. Appellant also argues the court erred by failing to disclose the statement after an in-camera inspection.

{¶107} The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to guilt or to punishment, irrespective of the good or bad faith of the prosecution. Id. at 87.

{¶108} In *State v. Wickline* (1990), 50 Ohio St. 3d 114, 552 N.E.2d 913, the Ohio Supreme Court rejected a claim that the state's failure to provide exculpatory information to the defendant prior to trial was a reversible *Brady* violation for three reasons. First, the Court noted that in *United States v. Agurs* (1976), 427 U.S. 97, 103, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342, the United States Supreme Court noted that the rule of *Brady* applies to situations involving the discovery, after trial, of information which

was known to the prosecution but unknown to the defense. In *Wickline*, the alleged exculpatory records were presented during the trial, and therefore no *Brady* violation existed. 50 Ohio St. 3d at 116.

{¶109} Second, the court in *Wickline* noted that Crim. R. 16(E)(3) provides:

{¶110} "If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances."

{¶111} The court held that the appellant could have pursued less drastic means than seeking a new trial. Id. The appellant argued that no remedial order could have ensured his right to a fair trial because the leading witness against him had already testified. The court concluded that pursuant to Crim R. 16(E)(3), the trial court was empowered to order the return of the witness and make her available for continued cross-examination. Id. at 117.

{¶112} Finally, the *Wickline* court concluded that the appellant had failed to show how the outcome of his trial would have been different had the materials been disclosed prior to trial. Id. In determining whether the prosecution improperly suppressed evidence favorable to an accused, the evidence is material only if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed to the defense. Id., citing *State v. Johnston* (1988), 39 Ohio St.3d 48,

529 N.E.2d 898, paragraph 5 of the syllabus. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

{¶113} In the instant case, in discovery, the State provided appellant with the following exculpatory information contained in Robert Hight's police statement:

{¶114} "Robert Hight stated that both perpetrators in the driveway shot his brother. He indicated that when his brother took the shotgun away from the one perpetrator, that individual pulled out a handgun and started shooting. The perpetrator that was closest to Robert Hight and the car also had a handgun and was shooting the victim. Hight stated that he believed that they both had 9mm handguns." Supplemental Response to Discovery, February 28, 2008.

{¶115} At trial, appellant called Robert Hight as a defense witness. Before Hight took the stand, counsel for appellant requested disclosure of the transcript of Hight's taped statement. The court reviewed the transcript, found nothing exculpatory therein and denied appellant's request. However, on cross-examination the State used the transcript to impeach Hight based on prior inconsistent statements. Because the State had utilized the document for cross-examination, the court advised appellant's counsel that he could now review the statement.

{¶116} In his statement to the police, Hight stated that he thought "they" shot his brother inside the house because when the kitchen door opened, Steven fell out. Robert told police that he thought someone in the house was chasing Steven because of the way he fell out of the house. Robert told police there were two men shooting at Steven, as disclosed by the state in discovery. The one closest to the car pointed a gun at Robert, and Robert believed the man would have killed him had his small terrier dog,

which was in the car with him, not attacked the gunman. Robert started the car and drove away.

{¶117} Appellant argues that Robert's statement concerning his brother being chased out of the house and possibly shot inside the house could have been used to impeach Byrd's testimony.

{¶118} As in *Wickline*, appellant was given access to the statement during trial, and, therefore, a *Brady* violation did not occur. While it is unclear whether counsel looked at the statement during the trial, had counsel done so when the statement was made available to him and believed the information therein was material to impeach Byrd's testimony, the court could have recalled Byrd for purposes of cross-examination under the power to enforce discovery given to the court in Crim. R. 16(E)(3). Further, appellant has not demonstrated a reasonable probability of a change in the outcome had he been given the entire statement prior to trial. Appellant was aware before trial that Hight told police there were two men shooting at his brother, which presumably is why he called Robert Hight to testify on his behalf. Appellant has not demonstrated how Hight's statement that he thought perhaps his brother was shot in the house because of the way he fell out of the door would have been used to impeach Byrd so as to cause a reasonable probability of a change in the outcome of the trial. Robert Hight's statement that he thought his brother was shot inside the house is based purely on speculation as Robert Hight did not state that he heard any shots fired inside the house. As appellant was not convicted of being the principal offender, the jury found the state did not prove beyond a reasonable doubt that appellant was the shooter. Nothing in the statement that Steven might have been shot inside the house undermines this verdict or shows

that appellant was not involved in the crime and that Byrd was lying about appellant's involvement. The evidence was undisputed that appellant was in the house with Hall and Byrd participating in the robbery.

{¶119} The fifth assignment of error is overruled.

VI

{¶120} In his final assignment of error, appellant argues that the court erred in the jury instructions. Appellant argues that the court did not instruct the jury that to be convicted of aiding or abetting appellant must have acted with the culpable mental state required to prove the principal offense. Appellant argues that the culpable mental state was not linked to the aiding and abetting language.

{¶121} We note at the outset that appellant failed to object to the instruction. Crim. R. 30(A) provides in pertinent part:

{¶122} "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."

{¶123} Therefore, appellant has waived any error and must demonstrate plain error under Crim. R. 52(B). Error is not 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 2 of the syllabus. Notice of plain error is to be taken with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. Id. at syllabus 3.

{¶124} A jury instruction must not be viewed in isolation, but must be viewed in context of the overall charge. *State v. Dixon*, 101 Ohio St.3d 328, 2004-Ohio-1585, 805

N.E.2d 1042, ¶41, citing *State v. Price* (1979), 60 Ohio St.2d 136, 398 N.E.2d 772, cert denied (1980), 446 &.S. 943.

{¶125} The court instructed the jury on aggravated murder as follows:

{¶126} "Before you can find the defendant guilty of this charge, you must find beyond a reasonable doubt that on or about the 21 day of June, 2007, and in Stark County, Ohio, the defendant did purposely cause the death of Steven J. Hight, Sr., while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, aggravated robbery and/or aggravated burglary, and/or kidnapping, and/or did aid or abet another in doing so. The court will now define for you the essential elements of the charge of aggravated murder." Tr. (VI) at 59.

{¶127} The court then defined each of the essential elements, including the culpable mental state of purposely and the definition of aid or abet. The court defined aid or abet, "Aid or abet means supported assisted, encouraged, cooperated with, advised or incited." Tr. (VI) at 61.

{¶128} The court then gave the jury the same instruction as to the other offenses with which appellant was charged, reading the definition of the crime including the culpable mental state and the aid or abet language:

{¶129} "The defendant, Zabe Jenkins, is charged in Count Two of the indictment with aggravated robbery. Before you can find the defendant guilty of this charge, you must find beyond a reasonable doubt that on or about the 21 day of June, 2007, and in Stark County, Ohio, the defendant, did, knowingly attempt or commit a theft offense, or in fleeing immediately after the attempt or offense, did have a deadly weapon on or about his person or under his control, to wit: A firearm, and did either display the

firearm, brandish it, indicate that he possessed it or used said weapon and/or did aid or abet another in so doing. Tr. (VI) at 77.

{¶130} "The defendant is charged in Count Three of the indictment with aggravated burglary. Before you can find the defendant guilty of this charge, you must find beyond a reasonable doubt that on or about the 21 day of June, 207, (sic) and in Stark County, Ohio, the defendant, did knowingly, by force, stealth or deception, trespass in 2311 20 Street, Northeast, Canton, Ohio, an occupied structure, or separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the defendant was present, with purpose to commit therein any criminal offense, to wit: Aggravated robbery, theft, and/or kidnapping, and the defendant had a deadly weapon or dangerous ordnance on or about his person or under his control, and/or did aid or abet another in so doing." Tr. (VI) 78-79.

{¶131} "The defendant is, Zabe Jenkins, is charged in Count Four of the indictment with kidnapping. Before you can find the defendant guilty of this charge, you must find beyond a reasonable doubt that on or about the 21 day of June, 2007, and in Stark County, Ohio, the defendant, did, purposely commit or attempt to commit kidnapping, to wit: The defendant, by force, threat or deception, removed Steven J. Hight, Sr., from the place where he was found or did restrain the liberty of Steven J. Hight, Sr. with the purpose to commit the commission of a felony, to wit: Aggravated robbery, and/or aggravated burglary, or flight thereafter, and being a felony of the first degree, defendant did not release the said Steven J. Hight, Sr., in a safe place, unharmed, and/or did aid or abet another in so doing." Tr. (VI) 80-81.

{¶132} Appellant attempts to demonstrate plain error by referring this Court to the questions asked by the jury, which he argues demonstrate the jury's confusion on the issue of the requisite mental state to convict appellant as an aider or abettor. During deliberations, the jury asked the judge if, for the aggravated murder charge, appellant had to be found to be the principal offender or had to be found to have prior calculation or design. Tr. (VI) 105-106. The court responded that he could be found guilty of aggravated murder, aggravated robbery, aggravated burglary and/or kidnapping if the jury found beyond a reasonable doubt that he committed the offense or aided another in so doing, but could not be found guilty of the specifications to aggravated murder, other than the gun specification, absent a finding that he was the principal offender or committed the murder with prior calculation and design. Tr.(VI) 106. Counsel objected and stated that the answer to the question should be simply "yes."

{¶133} The jury later asked, "Do you really have to have the weapon in your control to be found guilty of the gun specification?" Tr. (VI) 109. The court's response was to repeat the instruction previously given that appellant could be convicted of the firearm specification only if he was found guilty of the underlying charge and he had a firearm on or about his person or under his control while committing the offense, displayed the firearm, brandished the firearm, indicated that he possessed the firearm, or used the firearm to facilitate the offense, or did aid or abet another in doing so. Tr. (VI) 109-110. Counsel for appellant objected, arguing the court should simply refer the jury to the verdict forms. Tr.(VI) 111. Counsel noted that he believed the jury was confused because the state had retreated from their allegation that appellant was the

principal offender and moved toward a theory that appellant aided or abetted the shooting. Tr. (VI) 112.

{¶134} Appellant has not demonstrated plain error in the original instruction by the questions asked by the jury. It does not appear that the jury was confused on the culpable mental state for aiding and abetting, but rather was unclear of what they could or could not convict appellant of if they did not find beyond a reasonable doubt that he was the person who held the gun in his hand and fired it at Steven Hight, killing him. While perhaps the better practice would have been for the court to specifically instruct the jury that they had to find the culpable mental state for the underlying offense in order to convict appellant as an aider and abettor, the instruction read as a whole and the placement of the culpable mental state with the aid/abet language in the definition of each crime sufficiently linked the mental state to the aid and abet language such that appellant has not demonstrated plain error.

{¶135} Finally, appellant again argues that the cumulative effect of all errors in his trial requires reversal. As noted in Assignment of Error 4, the doctrine of cumulative error is not applicable to cases where the court has not found multiple instances of harmless error. *Garner,* supra, 74 Ohio St.3d at 64. Because we have not found multiple instances of harmless error, the doctrine of cumulative error does not apply in this case.

{¶136} The sixth assignment of error is overruled.

{¶137} Accordingly, the judgment of the Stark County Court of Common Pleas is affirmed.

By: Edwards, J.

Farmer, P.J. and

Wise, J. concur

s/Julie A. Edwards

s/Sheila G. Farmer

s/John W. Wise

JUDGES

JAE/r0910

[Cite as *State v. Jenkins*, 2009-Ohio-6254.]

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
ZABE JOHN JENKINS	:	
Defendant-Appellant	:	CASE NO. 2008 CA 00191

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Stark County Court of Common Pleas is affirmed. Costs assessed to appellant.

s/Julie A. Edwards

s/Sheila G. Farmer

s/John W. Wise

JUDGES