[Cite as *State v. Winters*, 2013-Ohio-2370.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-12-1041

Appellee — Trial Court No. CR0201101554

v.

Javaar E. Winters — **DECISION AND JUDGMENT**

Appellant — Decided: June 7, 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Evy M. Jarrett, Assistant Prosecuting Attorney, for appellee.

Kenneth J. Rexford, for appellant.

* * * * * *

PIETRYKOWSKI, J.

{¶ 1} Defendant-appellant, Javaar Winters, appeals the January 26, 2012 judgment of the Lucas County Court of Common Pleas which, following a jury trial convicting him of aggravated robbery, felonious assault, and attempted murder, with firearm

specifications, merged the attempted murder and felonious assault counts and sentenced appellant to a total of 12 years of imprisonment. For the reasons that follow, we affirm.

{¶ 2} On March 4, 2011, appellant was charged in the Lucas County Court of Common Pleas, Juvenile Division, with delinquency by attempted murder. On the date of the alleged crime, appellant was 16 years old. Following a probable cause hearing, and a finding of probable cause, the case was transferred to the general division of the Lucas County Court of Common Pleas.

{¶ 3} On April 11, 2011, appellant was indicted on one count of aggravated robbery, in violation of R.C. 2911.01(A)(1), two counts of felonious assault, in violation of R.C. 2903.11(A)(2), and one count of attempted murder, in violation of R.C. 2903.02. The charges all contained firearm specifications. The charges stemmed from a robbery and shooting on March 1, 2011, in Lucas County, Ohio. Appellant entered not guilty pleas to the charges.

{¶ 4} On June 8, 2011, appellant filed a motion to suppress evidence seized on May 2, 2011, during a warrantless search at appellant's residence. The motion further requested suppression of appellant's identification based on illegally seized photographs as "fruit of the poisonous tree." A suppression hearing was held on June 30, 2011, and the parties filed post-hearing memoranda. On November 11, 2011, the trial court denied appellant's motion to suppress.

{¶ 5} A jury trial in the matter commenced on January 10, 2012, and the following relevant evidence was presented. Toledo Police Officer Scott Bailey testified that on

March 1, 2011, at approximately 2:30 p.m., he responded to a call of a person shot at the 1100 block of Pinewood. Upon his arrival, Bailey observed the victim, Daryl Bryant, lying near the sidewalk in a pool of blood. Officer Bailey stated that the victim had difficulty speaking and that his focus was on preserving the crime scene and locating witnesses. Officer Bailey testified that he spoke with one witness who stated that the shooter was a black male dressed in all black clothing.

{¶ 6} Toledo Fire Lieutenant Cheryl Hill stated that she treated the shooting victim at the scene. Hill stated that they observed that the victim had been shot in the leg and he was having difficulty breathing. The paramedics exposed his chest and observed a gunshot wound to the left side. Due to the chest wound, Hill stated that the victim was in severe distress so they intubated him to aid his breathing. They transported the victim to the hospital.

{¶ 7} Terry Cousino, of the Toledo Police Department's Scientific Investigation Unit, testified that he is responsible for collecting physical evidence at crime scenes. When he arrived on the scene he began taking photographs; the photographs were admitted into evidence. Cousino also dusted the back door of a vehicle for fingerprints where the suspect had allegedly been sitting. The print found was later identified as the victim's. Cousino collected three spent shell casings and one spent bullet. Based on this evidence, Cousino determined that the weapon used was a .32 caliber semi-automatic.

{¶ 8} Witness Joyce Thornton testified that on March 1, 2011, she was driving shooting victim, Daryl Bryant, and his mother and they were running errands. They

dropped off Bryant's mother at her home and, per Bryant's request, went to a home at Woodland and Hawley. Thornton stated that she learned that Bryant was going to the home to purchase syringes for his personal heroin use.

{¶ 9} While Bryant was in the house, an individual approached the car, opened the door and asked for a ride. Thornton stated that she did not know the person and told him to shut her door. At that point, Bryant had returned and the man asked him for a ride; he offered to pay ten dollars. Thornton described the man as black, 20 to 21 years old, and wearing a black hoodie and black sweatpants. The man got in the back passenger seat. They drove him less than a half mile; he got out of the car and said that he would be right back. When he returned he asked them to take him back around the corner.

{¶ 10} When they arrived on Pinewood, the man asked them to pull over behind a black truck. Thornton stated that when she pulled over, the man pulled out a gun and put it to the back of Bryant's head and told Bryant to give him everything he had. According to Thornton, Bryant said he did not have anything and began to exit the vehicle. Bryant was then shot in the leg; Thornton heard two or three more gunshots. Thornton said that she "took off" in her car and drove around the corner. She immediately called 9-1-1 and remained there until she heard sirens.

{¶ 11} When Thornton returned to the scene, she observed Bryant on the ground with his leg wrapped in towels from some nearby residents. Bryant told her that he could not breathe. The EMS then arrived and began treating him.

{¶ 12} Thornton stated that she showed Detective Anderson the stops they made with the shooter and that they then went to the downtown police station. At that point Thornton was asked about and admitted to prior felony convictions involving forged checks, and convictions for petty theft and receiving stolen property. She also admitted to prior drug use.

{¶ 13} Thornton testified that police showed her a photo array with six individuals and she was unable to identify the shooter. Thornton stated that on March 3, 2011, she was shown another group of photos, which included individuals with facial tattoos. She had relayed to police that the shooter had a teardrop tattooed on his face. Thornton identified appellant as the shooter. In court, however, Thornton stated that appellant did not look like the shooter. Thornton admitted that she was scared because she did not want to send the wrong person to prison. She was also scared for her family who could be in jeopardy due to her testimony.

{¶ 14} Bryant's testimony of the facts leading up to the shooting was similar to Thornton's. On the morning of the shooting, Bryant was with his friend Joyce Thornton and his mother in Joyce's car. The trio had been running errands. After dropping off Bryant's mother, Thornton and Bryant proceeded to a home on Woodland. Bryant admitted that the stop was to purchase syringes and, although he admitted to past drug use, he testified that he planned on selling them to a third individual. Bryant stated that he was in the house approximately five minutes and when he returned to the car he noticed someone in the back seat. According to Bryant, Thornton told him the individual

was paying ten dollars for a ride. Bryant described the individual as a young black male, 18 or 19 years old, with skin slightly darker than his. He had a black hoodie up over his head.

{¶ 15} Bryant testified that they took him to Pinewood, where the man stated that they could let him out in back of a truck parked on the street. Bryant stated that the man said "I got to have that." Bryant stated that he exited the vehicle and, although he began to dig in his pocket, the suspect started shooting him. He was shot in his chest first and, after he began running, was shot again in the leg. Bryant testified that after he went down, he remembers nothing until four days later when he woke up in the hospital.

{¶ 16} Bryant was then questioned about the photo array he was shown on March 11, 2011, while in the hospital. Bryant identified appellant as the shooter but, at trial, testified that he was just coming out of a coma and did not know what was happening. Bryant stated that he just pointed at anything and that he did not have his glasses on. Bryant testified that the shooter was darker skinned than appellant. Bryant testified that he did not feel pressure to identify a suspect from the array. Bryant admitted to being scared at trial and denied that the shooter was in the courtroom.

{¶ 17} Toledo Police Detective and lead investigator, Larry Anderson, testified that when he arrived on Pinewood, several other officers and paramedics were on the scene. Anderson testified that he spoke with two juveniles who stated that they witnessed the shooting from across the street. They observed a black male dressed in all black

running away. Another neighbor heard shots, saw the victim on the ground, and saw someone running away.

{¶ 18} Detective Anderson testified that he spoke with Joyce Thornton. Anderson stated that Thornton was very nervous and acted like she did not want to talk to him at the scene. Thornton gave Anderson the background leading up to the shooting. She indicated that she and the victim had been shopping and had dropped his mother off at home. They then proceeded to the house on Woodland. At this point, Anderson stated that they proceeded to the police station to continue the interview. Anderson stated that Thornton's trial testimony was similar to the information she gave him.

{¶ 19} Detective Anderson testified that he went to the house on Woodland where Bryant purchased the syringes and spoke with four or five individuals. They gave Anderson the street names of some individuals who had been at the house that day with Bryant. One of the individuals, nicknamed Drop, was identified as appellant. Once appellant was identified, Anderson attempted to locate him.

{¶ 20} Detective Anderson stated that they were able to get a picture of appellant from the database, but that it was not current and did not represent how appellant looked. That photo was used in the initial array shown to Joyce Thornton. Their initial attempt to speak with Bryant was unsuccessful because he was in a coma.

{¶ 21} Detective Anderson testified that they went to appellant's mother's house to either speak with appellant or his mother, or get an updated photo to show witnesses. They were able to get some photos and met with Thornton again. At that time, Thornton

identified appellant as the shooter. Anderson further testified that, using an updated booking photo, they showed an array to Bryant and he identified appellant as the shooter.

{¶ 22} Toledo Police Detective Elizabeth Kantura testified that Detective Anderson asked her to show Thornton two photo arrays that he had compiled. Kantura stated that Thornton failed to identify a suspect in the first array of six photos. Detective Kantura stated that on March 3, 2011, she went to Thornton's home to show her a second array. These photos were taken from appellant's mother's house and depicted groups of friends. Kantura stated that as soon as Thornton got to the photo which included appellant, she immediately identified him. Detective Kantura clarified that she did not retrieve or compile the photographs.

{¶ 23} Toledo Police Detective James Scott testified that Detective Anderson asked him to show a photo array to Daryl Bryant at St. Vincent Hospital. Detective Scott stated that on March 11, 2011, he handed the six-person array to Bryant and he immediately pointed out appellant as the individual who shot him. Scott stated that this was the only array presented to Bryant.

{¶ 24} Following the conclusion of the trial and jury deliberations, the jury convicted appellant of attempted murder, felonious assault, and aggravated robbery, all with firearm specifications. At sentencing, the court merged the felonious assault and attempted murder convictions and the attached gun specifications. Appellant was then sentenced to four years of imprisonment for aggravated robbery and five years of imprisonment for attempted murder. The sentences were ordered to be served

consecutively to each other and to the three-year term for the firearm specification for a total of 12 years. The sentencing was journalized on January 26, 2012, and this appeal followed.

{¶ 25} Appellant raises nine assignments of error for our review:

I. Mr. Winters was denied his right under the Ohio Constitution and under the United States Constitution to Due Process of Law and effective assistance of counsel when the trial court allowed the prosecution to engage in prosecutorial misconduct by materially and falsely misquoting the evidence and by attaching inadmissible impeachment evidence without confrontation to its post-hearing briefing and considering the same against the defense.

II. The trial court erred by denying suppression, in violation of the Ohio Constitution and of the United States Constitution.

III. Mr. Winters was denied his right under the Ohio Constitution and under the United States Constitution to Due Process of Law and effective assistance of counsel when trial counsel failed to seek suppression and/or exclusion of unduly suggestive photo arrays and/or to comment upon statutory violations as to the same.

IV. The Lucas County Juvenile Court erred by relinquishing jurisdiction in this case without establishment of probable cause to believe that a Category One offense was committed by Mr. Winters and by not

conducting an amenability hearing as to any Category Two offenses that may have been established.

V. The trial court erred by not complying with R.C. § 2152.121 as to the one count of aggravated robbery.

VI. The trial court erred by allowing in hearsay evidence over objection, in violation of Ohio Rules and of the Confrontation Clause, and/or defense counsel was ineffective for failure to properly object to the same.

VII. Defendant was deprived of a fair trial due to prosecutorial misconduct which also compounded other errors to cumulatively deprive the accused of a fair trial.

VIII. The verdicts for each and every count were not supported by sufficient evidence.

IX. The verdicts for each and every count were against the manifest weight of the evidence.

Suppression of Evidence

{¶ 26} Appellant's first three assignments of error relate to the admissibility of identification evidence. In his first assignment of error, appellant argues that the trial court and counsel erroneously permitted the state in its post-hearing brief, in violation of appellant's right to due process of law, to improperly rebut the suppression hearing testimony of appellant's brother, Willie Hayes. Specifically, Hayes testified that he was

afraid of the police and that he did not have a criminal history other than a traffic ticket. In its brief, the state refuted his testimony by claiming that, following the hearing, it was discovered that Hayes had an active warrant and he was arrested. The state also attached a print-out of his criminal charges which included assault, disorderly conduct, and giving false information to a police officer. Appellant contends that he was prejudiced by not being able to challenge this additional evidence. Appellant also contends that the state "misquoted" evidence from the hearing in an attempt to discredit appellant's brother's testimony. The state counters that any mischaracterization of the evidence was inadvertent and that, the submission of evidence of Willie Hayes' criminal history was not improper and even if it were, it did not rise to the level of plain error or ineffective assistance of counsel.

{¶ 27} At the June 30, 2011 suppression hearing, Toledo Police Detective Larry Anderson testified that on March 2, 2011, police proceeded to appellant's mother's house to either locate appellant or acquire recent photographs of appellant. According to Anderson, he was accompanied by three officers when they knocked on the front door. Anderson testified that the individual who opened the door stated that he was appellant's brother who appeared to be in his teens. Detective Anderson stated that the group entered a step or two into the threshold. They then asked whether appellant was home; once they determined he was not, they asked if the brother had any photos of appellant.

{¶ 28} The brother retrieved several photos which included appellant with various individuals. Anderson testified that the brother did not leave his sight to get the photos

and that it took less than a minute. Anderson stated that, after asking, the brother indicated they could take the photos to make copies. Anderson admitted that the photos were not returned once appellant's counsel became involved in the case.

{¶ 29} During cross-examination, Detective Anderson admitted that Toledo Police Sergeant Noble had been to the home the day before looking for appellant. Anderson admitted that he did not have a search warrant when he went to appellant's house; he stated that they did not enter the home to conduct a search. Once inside the home, the teen telephoned the owner, his mother. Anderson does not remember which officer she spoke with. Detective Anderson stated that after acquiring the photos, police showed several to witness Joyce Thornton; she identified appellant as the shooter.

{¶ 30} Appellant's brother, Willie Hayes III, testified that when the police first came to the house they put a gun to another brother's head. Hayes was not present when this happened. Later that day, Hayes stated that there were five police officers on the front porch and that Detective Anderson knocked on the door. Anderson showed him a photo of appellant and his best friend, Marcus Smith.

{¶ 31} Hayes testified that the officers asked if they could look around and he said no. Hayes said that a female officer walked through the house. Hayes stated that the officer asked if she could go upstairs and that he said no; she went upstairs anyway. Hayes testified that Anderson noticed photos on a table and took them; he did not ask if he could borrow them.

{¶ 32} Hayes stated that he did not think he had a choice when the officers entered the house and that he was scared because he had never experienced anything like that. He stated that he backed away from the door out of fear and that it was not intended as a gesture to the officers to grant entry into the house. Hayes was 18 years old on the date of the incident.

{¶ 33} During cross-examination, Hayes denied any criminal history other than a ticket. Hayes also agreed that neither he nor his family ever lodged a complaint about the incident where police held a gun to his brother's head.

{¶ 34} Appellant first argues that the state improperly characterized Willie Hayes' testimony as contradictory by misquoting his testimony. Specifically, in its post-hearing brief, the state argued that Hayes initially testified that Detective Anderson took the photos but later stated that it was the female officer. Reviewing the transcript, we find that this was an incorrect statement but, as noted by the state, it was plausibly unintentional. Hayes was testifying about Anderson and the photos at the same time he was testifying about the female officer going upstairs. We find no prosecutorial misconduct or ineffective assistance of counsel as to the making of the statement or the failure to object to the statement.

{¶ 35} Appellant next argues that he was prejudiced by the state's addendum and argument relating to Willie Hayes' criminal record. The state used the record to attack Hayes' credibility. The state counters that it was permitted to use the records to impeach Hayes since he was not identified as a witness prior to the suppression hearing and that,

at suppression hearings, the rules of evidence do not apply. Further, the state argues that because the issue was not raised before the lower court, it must be reviewed for plain error. Plain error is found where, but for the error, the outcome of the proceeding would have been different. *State v. McKee*, 91 Ohio St.3d 292, 294, 744 N.E.2d 737 (2001). Similarly, appellant argues that counsel's failure to object rose to the level of ineffective assistance of counsel which requires a showing that, absent counsel's errors, the outcome of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

{¶ 36} As set forth above, during the suppression hearing Hayes denied having a criminal record. The state attempted to impeach his testimony after the hearing by attaching Hayes' criminal record to its brief. In reply, defense counsel noted that although the state attached Hayes' criminal record, during the hearing they provided no rebuttal evidence to refute his testimony.

{¶ 37} Reviewing the evidence presented at the hearing, we cannot say that absent the attachment of the criminal record, the court would have granted appellant's motion to suppress. Evidence was presented that Hayes allowed the officers into the home and allowed them to take the photos. Further, officers spoke with the homeowner and there was no indication that she either revoked consent for them to be in the home or refused their request to take the photos. Appellant's first assignment of error is not well-taken.

{¶ 38} In his second assignment of error, appellant asserts that the trial court erred when it denied his motion to suppress the photographs used to identify him as the

suspect. Review of a trial court's denial of a motion to suppress presents mixed questions of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. "When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses." *Id.*, citing *State v. Mills*, 62 Ohio St.3d 357, 366, 582 N.E.2d 972 (1992). "[T]he appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard." *Burnside* at ¶ 8, citing *State v. McNamara*, 124 Ohio App.3d 706, 707 N.E.2d 539 (4th Dist.1997).

{¶ 39} It is undisputed that the officers did not have a search warrant and, thus, one of the exceptions to the warrant requirement must be proven. *State v. Gunn*, 12th Dist. No. CA2003-10-035, 2004-Ohio-6665, ¶ 19, citing *State v. Nields*, 93 Ohio St.3d 6, 15, 752 N.E.2d 859 (2001). One such exception is consent of the occupant which is to be determined based on the totality of the circumstances. *Id.* at ¶ 20, citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). The state had the burden of proving voluntary consent. *Id.*, citing *Bumper v. North Carolina*, 391 U.S. 543, 548, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968).

{¶ 40} In the present case, as set forth above, we find that ample evidence was provided to demonstrate that 18-year-old Hayes allowed the officers to enter the home and allowed their removal of the photos. Further, police spoke with the owner of the home and there is no evidence that any permissions were revoked. Accordingly, we find

that the court did not err in denying appellant's motion to suppress. Appellant's second assignment of error is not well-taken.

{¶ 41} In appellant's third assignment of error he argues that counsel was ineffective by failing to file a motion to suppress or exclude the unduly suggestive photo array which was conducted in violation of R.C. 2933.83. Specifically, appellant contends that R.C. 2933.83, effective July 2010, requires any law enforcement agency that conducts live and photo lineups to adopt "specific procedures" for conducting the lineups. R.C 2933.83(B). Such procedures must provide, at minimum, the use of a "blind or blinded" administrator for the array. R.C. 2933.83(B)(1). Blind or blinded administrators are defined in R.C. 2933.83(A) as follows:

> (2) "Blind administrator" means the administrator does not know the identity of the suspect. "Blind administrator" includes an administrator who conducts a photo lineup through the use of a folder system or a substantially similar system.
>
> (3) "Blinded administrator" means the administrator may know who the suspect is, but does not know which lineup member is being viewed by the eyewitness. "Blinded administrator" includes an administrator who conducts a photo lineup through the use of a folder system or a substantially similar system.

{¶ 42} The folder system set forth in the statute provides for the suspect's photograph, five filler photographs and four dummy folders. The folders are shuffled and

the administrator does not know which folder the witness is viewing. R.C. 2933.83(A)(6). The statute does not require the use of the folder system.

{¶ 43} The statute further provides that evidence of noncompliance with the statute shall be considered by courts in ruling on a defendant's motion to suppress. R.C. 2933.83(C)(1). In addition, such evidence is admissible at trial. R.C. 2933.83(C)(2). If such evidence is admitted at trial, the court shall instruct the jury that such noncompliance may be considered in determining the credibility of the witness identification. R.C. 2933.83(C)(3).

{¶ 44} Appellant contends that the three photo arrays compiled in the case did not comply with the above-quoted statute and were unduly suggestive. This court recently addressed this issue in *State v. Henry*, 6th Dist. No. L-11-1157, 2012-Ohio-5552. In *Henry*, the appellant argued that police failed to comply with newly enacted R.C. 2933.83. We noted that the officer who compiled the array did not present it to the victim and did not know the identity of the victim. *Id.* at ¶ 49. We further found that, even assuming that the officers failed to comply with the statute it did not require that the photo identification be suppressed *Id.* at ¶ 46. *See State v. Simpson*, 2d Dist. No. 25163, 2013-Ohio-1696, ¶ 11.

{¶ 45} In the present case, Detective Anderson compiled the arrays and Detectives Kantura and Scott presented them to the victims. There was no evidence that the officers knew the identity of the suspect. Appellant further contends that the arrays were suggestive but fails to elucidate. Accordingly, because we cannot say that the

suppression motion would have been granted, appellant has failed to demonstrate that counsel was ineffective in failing to move to suppress the photo identification. Appellant's third assignment of error is not well-taken.

Bindover/Transfer Issues

{¶ 46} In appellant's fourth assignment of error, he argues that the juvenile court erroneously transferred the case to the general division without first establishing probable cause to believe that appellant committed the crime of attempted murder. R.C. 2152.12(A)(1)(a) provides:

> After a complaint has been filed alleging that a child is a delinquent child for committing an act that would be aggravated murder, murder, attempted aggravated murder, or attempted murder if committed by an adult, the juvenile court at a hearing shall transfer the case if either of the following applies:
>
> (i) The child was sixteen or seventeen years of age at the time of the act charged and there is probable cause to believe that the child committed the act charged.

{¶ 47} In establishing probable cause, the state "must provide credible evidence of every element of an offense before ordering mandatory waiver of juvenile court jurisdiction." *State v. Iacona*, 93 Ohio St.3d 83, 93, 752 N.E.2d 937 (2001). This standard requires more than a mere suspicion of guilt but less than establishing guilt beyond a reasonable doubt. *Id*. On review of a bindover proceeding, this court defers to

the trial court's factual determinations but review the probable cause determination, a question of law, de novo. *See In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, 897 N.E.2d 629, ¶ 44-51.

{¶ 48} In the present case, appellant was 16 years old at the time of the offense and charged with attempted murder if committed by an adult. The offense of attempted murder requires that appellant attempted to purposely cause the death of another. R.C. 2903.02(A). At the probable cause hearing, Joyce Thornton testified that while they were in her vehicle, appellant put a gun to Daryl Bryant's head and demanded all of his money. According to Thornton, as soon as appellant and Bryant exited the vehicle she heard a gunshot. After the first shot she heard Bryant yell "My leg." Thornton stated that she drove away and heard three or four additional shots. When she returned, Thornton observed Bryant on the ground with towels wrapped around his leg and neighbors trying to stop the bleeding. Thornton testified that when the paramedics arrived and opened his shirt she saw that he had been shot in the chest as well. Bryant told Thornton that he could not breathe.

{¶ 49} Thornton further testified that she did not recognize the shooter in the first photo array she was shown. Thornton stated that she was later shown a composite of three photographs and that she identified the shooter.

{¶ 50} Finding probable cause, the juvenile court noted that a shot to the chest, at close range, would be considered an attempt to take a life. The court further found that

there was some competent evidence that appellant was the individual who attempted to kill Daryl Bryant.

{¶ 51} In this assignment of error, appellant's chief complaint was the court's comment that the shooting took place at "close range." Appellant claims that there was no evidence presented to make such an inference and that, although three to four shots were fired only two hit the victim. Reviewing the testimony, the shooter and Bryant were together when they exited the vehicle and that Bryant was shot in the leg as soon as they got out. Even assuming that Bryant began to run away from the shooter, they were still close together to infer that the shooter was attempting to murder him. Further, while the two were still in the vehicle, the shooter first put the gun to appellant's head. We find that the facts presented at the hearing were legally sufficient to establish probable cause that appellant purposely attempted to cause the death of Bryant. Appellant's fourth assignment of error is not well-taken.

{¶ 52} Appellant's fifth assignment of error contends that the trial court erroneously determined that R.C. 2152.121(B)(4) permitted it to retain jurisdiction over all the charges for sentencing. Specifically, appellant argues that the "inartfully drafted" statute does not clearly require that the court retain jurisdiction over all the charges for which appellant was convicted; rather, because the court failed to make the necessary findings under R.C. 2152.12, a reverse transfer was required for further consideration of the sentence as to the aggravated robbery, a category two, conviction.

{¶ 53} Effective on September 30, 2011, R.C. 2151.23 provides the following with respect to the juvenile court's jurisdiction:

> (H) If a child who is charged with an act that would be an offense if committed by an adult was fourteen years of age or older and under eighteen years of age at the time of the alleged act and if the case is transferred for criminal prosecution pursuant to section 2152.12 of the Revised Code, except as provided in section 2152.121 of the Revised Code, the juvenile court does not have jurisdiction to hear or determine the case subsequent to the transfer. The court to which the case is transferred for criminal prosecution pursuant to that section has jurisdiction subsequent to the transfer to hear and determine the case in the same manner as if the case originally had been commenced in that court, subject to section 2152.121 of the Revised Code, including, but not limited to, jurisdiction to accept a plea of guilty or another plea authorized by Criminal Rule 11 or another section of the Revised Code and jurisdiction to accept a verdict and to enter a judgment of conviction pursuant to the Rules of Criminal Procedure against the child for the commission of the offense that was the basis of the transfer of the case for criminal prosecution, whether the conviction is for the same degree or a lesser degree of the offense charged, for the commission of a lesser-included offense, or for the commission of another offense that is different from the offense charged.

{¶ 54} R.C. 2152.121 provides, in pertinent part:

(A) If a complaint is filed against a child alleging that the child is a delinquent child and the case is transferred pursuant to division (A)(1)(a)(i) or (A)(1)(b)(ii) of section 2152.12 of the Revised Code, the juvenile court that transferred the case shall retain jurisdiction for purposes of making disposition of the child when required under division (B) of this section.

(B) If a complaint is filed against a child alleging that the child is a delinquent child, if the case is transferred pursuant to division (A)(1)(a)(i) or (A)(1)(b)(ii) of section 2152.12 of the Revised Code, and if the child subsequently is convicted of or pleads guilty to an offense in that case, the sentence to be imposed or disposition to be made of the child shall be determined as follows:

(1) The court in which the child is convicted of or pleads guilty to the offense shall determine whether, had a complaint been filed in juvenile court alleging that the child was a delinquent child for committing an act that would be that offense if committed by an adult, division (A) of section 2152.12 of the Revised Code would have required mandatory transfer of the case or division (B) of that section would have allowed discretionary transfer of the case. The court shall not consider the factor specified in division (B)(3) of section 2152.12 of the Revised Code in making its determination under this division.

> If the juvenile court grants the motion of the prosecuting attorney under this division, the juvenile court shall transfer jurisdiction of the case back to the court in which the child was convicted of or pleaded guilty to the offense, and the sentence imposed by that court shall be invoked. If the juvenile court denies the motion of the prosecuting attorney under this section, the juvenile court shall impose a serious youthful offender dispositional sentence upon the child in accordance with division (B)(3)(a) of this section.
>
> * * *.
>
> (4) If the court in which the child is convicted of or pleads guilty to the offense determines under division (B)(1) of this section that, had a complaint been filed in juvenile court alleging that the child was a delinquent child for committing an act that would be that offense if committed by an adult, division (A) of section 2152.12 of the Revised Code would have required mandatory transfer of the case, the court shall impose sentence upon the child under Chapter 2929. of the Revised Code.

{¶ 55} In the present case, it is undisputed that appellant's conviction for attempted murder was a category one offense and required mandatory transfer of the case. Appellant asserts that, although the aggravated robbery charge would have likely required a mandatory transfer, the "ineptly" drafted R.C. 2152.121 appears to require that each charge be separately analyzed to determine whether transfer was appropriate.

{¶ 56} Appellant correctly notes that the aggravated robbery charge is a category two offense but, because a firearm was used to facilitate the offense, was eligible for mandatory transfer. R.C. 2152.10(A)(2)(b). Reviewing R.C. 2152.121(B)(4), we find no requirement that the trial court engage in any particular fact finding. The jury convicted appellant of the charge beyond a reasonable doubt. This is sufficient to grant the trial court the authority to impose sentence. Appellant's fifth assignment of error is not well-taken.

Trial Issues

{¶ 57} Appellant's sixth assignment of error asserts that, over objection, improper hearsay evidence was admitted at trial. Specifically, Detective Anderson's testimony that individuals at the "crack house" where Bryant had purchased syringes told Anderson that appellant and Marcus Smith (identified by their street names of Drop and Postman, respectively) had been at the house at the same time as Bryant. The state counters that this information was investigative in nature and led police to develop appellant as a suspect.

{¶ 58} The testimony at issue provides:

> A: Went in the house. Knocked at the door. Went in the house. And spoke with the residents there. You know, they didn't want to be involved. They just – you know they gave us some details about what they had seen.

Q: How many – approximately how many folks did you talk to at the residence, if you recall?

A: Let's see, one – about four or five.

Q: Okay. And you indicated that they didn't want to be involved. How do you know that?

A: Because they won't give us their names.

Q: But they were able to give you information?

A: Yes.

Q: How long did you stay at that residence?

A: We probably stayed there maybe 10 – 10, 15 minutes.

* * *

Q: * * *. What did you do with that information or what did you do next?

A: Well, they gave us some street names of people they had seen, and what they had seen, and we followed up trying to identify those street names.

Q: And were you successful in identifying or putting the street names with the real name?

A: Yes.

Q: And what names did you come up with?

A: They had given us the name Postman, came back to Marcus Smith and Drop that came back to Javaar Winters.

* * *.

Q: So you say you went – where did you go to try to develop that information or where did you get that information?

A: We got from individuals in the house. They were – they didn't know them by name. They knew them by street name and they made statements to us basically identifying that they had been there that day and they had seen –

{¶ 59} At this point, defense counsel objected; the objection was overruled. Detective Anderson proceeded to testify as to the course of the investigation after receiving the names.

{¶ 60} Appellant now argues that the above-quoted testimony was impermissible hearsay and was the only evidence at trial, other than the two witnesses who recanted their identification, placing appellant near the scene. The state counters that the testimony was permissible as an out-of-court statement to explain the course of his investigation.

{¶ 61} Ohio courts have long-held that out-of-court statements are admissible to explain the actions of a police officer during an investigation. This is so because the statements are not hearsay where they are not offered for their truth; rather, to explain the course of the investigation. *See State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880

N.E.2d 31, ¶ 117; *State v. Thomas*, 61 Ohio St.2d 223, 400 N.E.2d 401 (1980); *State v. Munn*, 6th Dist. No. L-08-1363, 2009-Ohio-5879, ¶ 25-27.

{¶ 62} This court has recently addressed the issue of the admissibility of out-of-court statements made to investigating officers. *State v. Robinson*, 6th Dist. No. L-10-1369, 2012-Ohio-6068. In *Robinson*, the appellant's case proceeded to a jury trial on counts of possession of and trafficking in crack cocaine and having a weapon under a disability. *Id.* at ¶ 2-3. During trial, the investigating officer testified that he sent a confidential informant to a residence where drugs were allegedly being sold. *Id.* at ¶ 4-5. Over objection, the officer testified that the informant returned with marijuana and told him that an individual named "Cliff" sold the drugs to him. *Id.* at ¶ 5. Thereafter, the officers obtained a search warrant and discovered appellant, crack cocaine, items used to distribute narcotics, and firearms. *Id.* at ¶ 6-7.

{¶ 63} Appellant argued that the officer's testimony that the informant told him that "Cliff" sold him the drugs was inadmissible hearsay. Conversely, the state argued that it was not offered as to its truth; rather, to show why the officers obtained a search warrant. *Id.* at ¶ 30.

{¶ 64} While the court determined that the statement was not inadmissible hearsay, we examined its admissibility under Evid.R. 403(A). Weighing the probative value of the testimony against the prejudicial effect, we noted that the content of the statement implicated the appellant in the trafficking of marijuana. The court explained that although the "statement did not directly connect Robinson with the crime charged,

which is trafficking in crack cocaine, it nevertheless contained a potentially prejudicial accusation of criminality." *Id.* at 34. We further noted that the probative value was low because testimony that the confidential informant purchased drugs at the location, without a name, was sufficient for the jury to determine the cause for the search warrant. *Id.*

{¶ 65} In the present case, Detective Anderson testified that individuals at the boarding house stated that appellant, or "Drop" as he was known, had been there near the time of the shooting. Unlike *Robinson*, the fact that appellant was at the house did not directly tie him to the criminal acts charged (although it may have linked him to illegal drug use). The individuals did not state that he had a firearm or that he had expressed the intent to rob Bryant or anyone else. Certainly, the prejudicial effect of the testimony could have, and was, challenged by defense counsel. Detective Anderson admitted that he did not know the individuals who gave him appellant's street name, did not know if they were under the influence of narcotics, and did not know if they had a reason to fabricate the information. The testimony was valuable to the state because it explained to the jury how the officers developed a suspect.

{¶ 66} Accordingly, we find that the testimony was admissible to show the course of the investigation. Appellant's sixth assignment of error is not well-taken.

{¶ 67} In his seventh assignment of error, appellant contends that the prosecutor engaged in misconduct by improperly commenting on defense counsel's failure to file a motion to suppress the photo array identification of appellant and by improper statements

made during the state's rebuttal closing argument. We will address each argument in order.

{¶ 68} We first note that "[t]he test for prosecutorial misconduct is whether the remarks were improper and, if so, whether they prejudicially affected substantial rights of the accused." *State v. Eley*, 77 Ohio St.3d 174, 187, 672 N.E.2d 640 (1996); *State v. Lott*, 51 Ohio St.3d 160, 165, 555 N.E.2d 293 (1990). In order to grant a new trial for prosecutorial misconduct, we cannot merely find that the acts of the prosecutor are culpable, but must also find that these acts detrimentally affected the fairness of the proceedings. *State v. Twyford*, 94 Ohio St.3d 340, 355, 763 N.E.2d 122 (2002), citing *Smith v. Phillips*, 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982); *State v. Jones*, 6th Dist. No. L-09-1002, 2010-Ohio-4054, ¶ 47.

{¶ 69} Appellant argues that during Detective Anderson's redirect testimony, the prosecutor went on a "tirade" regarding the failure of defense counsel to file a motion to suppress. Counsel objected and the objection was sustained. The prosecutor again attempted to discredit defense counsel's cross-examination attacking the reliability of the photo array as follows:

Q: There is a process of [sic] objecting to the admissibility of items?

A: Yes.

Q: That didn't happen in this case, did it?

A: To the photo array themselves?

Q: Yes.

A: No.

Q: So no matter what questions Mr. Kinney has about the suggestibility of these photo arrays these are the photo arrays you presented.

{¶ 70} At this point another objection was raised and a bench conference held. Defense counsel requested a curative instruction but the court determined that such an instruction would negatively highlight the issue for the jury. The court sustained the objection and ordered that the response be stricken.

{¶ 71} In this case, the prosecutor's comments were improper. However, the court sustained the objections and struck Anderson's response. The court's refusal to give a curative instruction is reviewed for an abuse of discretion. *See State v. Wolons*, 44 Ohio St.3d 64, 68, 541 N.E.2d 443 (1989). Upon review, we cannot say that the court's reasoning in refusing to give the instruction was arbitrary or unconscionable.

{¶ 72} Appellant next argues that the prosecutor made improper comments regarding defense counsel during his rebuttal. Specifically, appellant argues that the prosecutor suggested that counsel misled or was trying to trick the jury and continued with the verbal assault despite two sustained objections.

{¶ 73} Reviewing the state's rebuttal, we conclude that the state was responding to arguments made in defense counsel's closing. Identification of appellant as the shooter was the central issue in the case. Defense counsel argued that the earlier identifications by Bryant and Thornton were invalid because they were either on pain medications, drug

addicts, or criminals but that, once in court, they decided to be truthful. The prosecutor, albeit improperly commenting on tactical matters, pointed out what he believed were inconsistencies in counsel's argument. Two of counsel's objections were sustained (as were two of the prosecutor's objections during the defense closing). We find that the prosecutor's rebuttal comments did not rise to the level of misconduct.

{¶ 74} Also in this assignment of error, appellant makes an argument regarding cumulative error. We have stated that "although a particular error by itself may not constitute prejudicial error, the cumulative effect of the errors may deprive a defendant of a fair trial and may warrant the reversal of his conviction." *State v. Hemsley*, 6th Dist. No. WM-02-010, 2003-Ohio-5192, ¶ 32, citing *State v. DeMarco*, 31 Ohio St.3d 191, 509 N.E.2d 1256 (1987), paragraph two of the syllabus. "'However, in order even to consider whether "cumulative" error is present, we would first have to find that multiple errors were committed in this case.'" *Hemsley* at ¶ 32, quoting *State v. Madrigal*, 87 Ohio St.3d 378, 398, 721 N.E.2d 52 (2000).

{¶ 75} Upon review of appellant's assignments of error, we cannot say that there were multiple instances of harmless error; accordingly, there can be no cumulative error. Appellant's seventh assignment of error is not well-taken.

{¶ 76} Appellant's eighth and ninth assignments of error argue that the jury's verdicts were not supported by sufficient evidence and were against the manifest weight of the evidence. They will be jointly addressed. Ohio courts have frequently noted that sufficiency of the evidence and manifest weight of the evidence are quantitatively and

qualitatively different legal concepts. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). Sufficiency of the evidence is purely a question of law. *Id.* At its core, sufficiency of the evidence is a determination of adequacy and a court must consider whether the evidence was sufficient to support the conviction as a matter of law. *Id*. The proper analysis is "'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. Williams*, 74 Ohio St.3d 569, 576, 660 N.E.2d 724 (1996), quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶ 77} In contrast, a manifest weight challenge questions whether the state has met its burden of persuasion. *Thompkins* at 387. In making this determination, the court of appeals sits as a "thirteenth juror" and, after:

> "reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the 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. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Id*., quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶ 78} Appellant argues that, as to these assignments of error, the evidence presented at trial was insufficient and that the jury lost its way in determining that appellant was the individual who shot Daryl Bryant. The jury in this case was charged with determining whether the victims/witnesses were truthful when they identified appellant shortly after the crime or, whether, their trial testimony was truthful. Carefully reviewing the evidence presented, we conclude that there was sufficient evidence to identify appellant as the shooter and that the jury did not lose its way in resolving the conflicts in the identification testimony. Appellant's eighth and ninth assignments of error are not well-taken.

{¶ 79} On consideration whereof, we find that appellant was not prejudiced or prevented from having a fair trial and the judgment of the Lucas County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

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JUDGE

Thomas J. Osowik, J.

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JUDGE

Stephen A. Yarbrough, J.
CONCUR.

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JUDGE