[Cite as *State v. Young*, 2008-Ohio-5046.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	CASE NO. 07 MA 120
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	O P I N I O N
	)	
STEPHANIE YOUNG,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Youngstown Municipal Court, Case No. 06CRB226.
JUDGMENT:	Affirmed.

APPEARANCES:

For Plaintiff-Appellee:	Attorney Joseph Macejko Prosecuting Attorney 26 South Phelps Street Youngstown, Ohio 44503
For Defendant-Appellant:	Attorney Douglas King 91 West Taggart Street P.O. Box 85 East Palestine, Ohio 44413

JUDGES:

Hon. Joseph J. Vukovich
Hon. Mary DeGenaro
Hon. Gene Donofrio

Dated: September 26, 2008

VUKOVICH, J.

{¶1} Defendant-appellant Stephanie Young appeals from her conviction of criminal damaging entered after a jury trial in the Youngstown Municipal Court. Appellant raises issues with the court's instruction on inferences and with the later instruction provided after the jury voiced that it was unable to reach a verdict. Appellant further alleges that the evidence was insufficient to show that the damaged property belonged to the victim and argues that the verdict was contrary to the manifest weight of the evidence. She also complains that a statement about her intoxication was prejudicial and based upon hearsay. Finally, appellant claims prosecutorial misconduct in closing argument where the state opined that the victim's testimony was credible. For all of the following reasons, the judgment of the trial court is affirmed.

STATEMENT OF FACTS

{¶2} On January 30, 2006, Sharon Slade filed a criminal damaging or endangering complaint against appellant alleging that appellant threw a large rock through her front window early that morning. At the May 23, 2007 jury trial, Ms. Slade testified that she knew appellant well as she once believed that appellant was carrying her grandchild. When later paternity tests revealed that Ms. Slade's son was not the father, the relationship deteriorated. (Tr. 102-104).

{¶3} Ms. Slade then revealed that on January 29, 2006, she was called to the scene of an argument on McGuffey Road where appellant was standing in the road yelling at Ms. Slade's daughter after they both had stopped their vehicles. Police were called to diffuse the situation. (Tr. 104-106).

{¶4} After this incident, Ms. Slade returned to her home at 433 Woodside Avenue in Youngstown, Ohio. She was watching television around 2:00 a.m., when she noticed that a motion sensor light had activated in the yard. (Tr. 107-108). Upon getting up to investigate, she heard a crash from the room she had just left. She saw

that a large rock, which was identified at trial, had been thrown through the picture window and had landed on the floor. (Tr. 109-110).

{¶5} Ms. Slade then opened the front door and saw appellant in her driveway. Ms. Slade testified that appellant cursed, "Fuck you, bitch," entered the same vehicle she was driving earlier and drove away. (Tr. 111-112). Police responded that night, and Ms. Slade filed the complaint later that day. She testified that the glass replacement cost her just over $180, and she produced a receipt in support. (Tr. 114-115). A detective briefly testified, and the defense presented no evidence.

{¶6} When the jury advised that they could not reach a verdict, the court gave further instructions and asked them to return to the jury room. Thereafter, the jury returned a guilty verdict, convicting appellant of criminal damaging or endangering. On January 15, 2007, the court sentenced appellant to ten days of electronic monitoring house arrest and one year of probation. The court also ordered appellant to pay $180.83 in restitution. Appellant filed timely notice of appeal.

ASSIGNMENT OF ERROR NUMBER ONE

{¶7} Appellant sets forth seven assignments of error, the first of which provides:

{¶8} "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY FAILING TO GIVE THE *MARTENS* JURY CHARGE AND INSTEAD GIVING THE JURY THE *HOWARD* CHARGE, OVER OBJECTION OF COUNSEL."

{¶9} After approximately two and one-half hours of jury deliberation, the court stated on the record that the jury had advised that it was unable to reach a verdict as they had a difference of opinion. (Tr. 188). When the court announced that it would give a supplemental instruction called the *Howard* charge, the defense asked the court to add a second charge as previously discussed off the record. The court refused, responding that it did not think that a verdict was impossible. (Tr. 189). The court then gave the following unobjected to version of the *Howard* charge:

{¶10} "In a large proportion of cases, absolute certainty cannot be attained or expected. Although the verdict must reflect the verdict of each juror and not mere acquiescence in the conclusion of other jurors, each question submitted to you should be considered with proper regard and deference to the opinions of others. It is

desirable that this case be decided. You are selected in the same manner, and from the same source, as any future jury would be. There is no reason to believe the case will ever be submitted to a jury more capable, impartial, or intelligent than this one. Likewise, there is no reason to believe that more or clearer evidence will be produced by either side. It is your duty to decide the case, if you can conscientiously do so. You should listen to one another's arguments with a disposition to be persuaded. Do not hesitate to reexamine your views and change your position if you are convinced it is erroneous. If there is disagreement, all jurors should reexamine their positions, given that a unanimous verdict has not been reached. Jurors for acquittal should consider whether their doubt is reasonable, considering that it is not shared by others, equally honest, who have heard the same evidence, with the same desire to arrive at the truth, and under the same oath. Likewise, jurors for conviction should ask themselves whether they might not reasonably doubt the correctness of a judgment not concurred in by all other jurors."

{¶11} The language of the court's instruction is nearly the same language proposed by the Supreme Court for use in such situations. See *State v. Howard* (1989), 42 Ohio St.3d 18, 25-26. Since this charge need not exactly mirror the Supreme Court's proposal and since the content of the charge is not at issue here, we shall not compare the charge given with the precise *Howard* language. Rather, on appeal, appellant contends that the court erred in failing to give a *Martens* charge after the *Howard* charge.

{¶12} A *Martens* charge discusses the impossibility of reaching a verdict and is further reflected in Ohio Jury Instructions (2000), Section 415.50(4). See *State v. Martens* (1993), 90 Ohio App.3d 338. The charge provides:

{¶13} "If you decide that you cannot agree and that further deliberations will not serve a useful purpose you may ask to be returned to the courtroom and report that fact to the court. If there is a possibility of reaching a verdict you should continue your deliberations." Id. at 343.

{¶14} It is well-established that this instruction should not be given prematurely or it could counteract the objective of the *Howard* charge to encourage a verdict where one can conscientiously be reached. *State v. Brown*, 100 Ohio St.3d 51, 2003-Ohio-

5059, ¶38, citing *Martens*, 90 Ohio App.3d at 343. In *Brown*, the Supreme Court upheld the refusal to give a *Martens* charge at a capital sentencing jury's first deadlock and at their later disclosure of a compromise verdict even though days had passed during deliberations. Contrary to appellant's suggestion, *Brown* makes clear that merely because a jury says that they are unable to reach a verdict does not mean this is so. See id. at ¶29, 38-39 (where the jury initially said that they cannot reach a verdict and that they were deadlocked on a charge). In fact, the very reason for a *Howard* charge is because the jury *believes* it is deadlocked. *State v. Gapen*, 104 Ohio St.3d 358, 2004-Ohio-6548, ¶128. The decision on when a jury can be characterized as irreconcilably deadlocked is within the trial court's sound discretion. Id. at ¶127.

{¶15} Even in *Martens*, the appellate court upheld the refusal to give the additional instruction reasoning that it would have negated the effect of the *Howard* charge. Such consequence was a consideration in this case as well. This was the first time the jury came to the court with its deadlock and less than three hours had elapsed since they began deliberations. Although the time elapsed can be related to the intricacies of the case and this case is not very intricate, it is still noteworthy that the deliberations in *Brown* went on for days without a *Martens* charge.

{¶16} In conclusion, the trial court reasonably determined and appellant concedes here that a *Howard* charge was proper to encourage a verdict if one could conscientiously be reached. The addition of the *Martens* charge at the same time was not required as it would have detracted from the language and intent of the *Howard* charge. Consequently, this assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER TWO

{¶17} Appellant's second assignment of error contends:

{¶18} "THE TRIAL COURT ERRED IN ITS INSTRUCTIONS TO THE JURY BY SUBSTITUTING A GREATER WEIGHT OF THE EVIDENCE STANDARD FOR THE PROOF BEYOND A REASONABLE DOUBT STANDARD WHEN INSTRUCTING THE JURY ON INFERENCES. THEREBY DEPRIVING DEFENDANT/APPELLANT OF HER DUE PROCESS RIGHTS."

{¶19} In instructing the jury on circumstantial evidence and inferences, the court stated:

{¶20} "Circumstantial evidence is proof of facts or circumstances by direct evidence from which you may reasonably infer other related or connected facts which naturally and logically follow, according to the common experience of humankind.

{¶21} "To infer or make inference, is to reach a reasonable conclusion of fact which you may but are not required to make from other facts which you find have been established by direct evidence. Whether an inference is made rests entirely with you.

{¶22} "You may infer a fact or facts only from other facts or circumstances that have been proved by the *greater weight of the evidence*, but you may not make inferences from a speculative or remote basis that has not been established by the *greater weight of the evidence.*" (Tr. 175-176) (Emphasis added to disputed portion).

{¶23} Appellant only takes issue with the third paragraph in the above quote dealing with an inference upon an inference. She argues that this particular instruction is for civil cases only, citing Committee Comment for Ohio Jury Instruction 5.10. She urges that the instruction violated her due process rights by essentially lessening the state's burden of proving the elements beyond a reasonable doubt and allowed the jury to draw inferences from facts established only by the greater weight of the evidence.

{¶24} Greater weight of the evidence is equated with preponderance of the evidence. *Travelers' Ins. Co. v. Gath* (1928), 118 Ohio St. 257, 261. As appellant states, the disputed instruction containing the greater weight of the evidence phrase is meant only for civil cases. *State v. Doan* (Feb. 28, 2000), 12th Dist. No. CA97-12-014; *State v. Coe* (June 4, 1998), 3d Dist. No. 13-97-46. As such, the instruction is erroneously given in a criminal case. Id.

{¶25} Jury instructions that in effect relieve the state of its burden of persuasion violate the defendant's due process rights. *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, ¶97. However, a defendant must object to disputed jury instructions in order to preserve an issue raised by the charge. "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." Crim.R. 30. Here, appellant failed to object to the instruction now raised. (Tr. 176, 186). As such, the issue is waived. Thus, our review can proceed only under a plain error analysis. *Adams*, 103 Ohio St.3d 508 at ¶100.

{¶26} Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court. Crim.R. 52(B). This is a discretionary doctrine which can, but need not, be employed by the appellate court and which must be utilized with the utmost of care in only exceptional circumstances where there is perceived to be a manifest miscarriage of justice. *State v. Hughbanks*, 99 Ohio St.3d 365, 2003-Ohio-4121, ¶39.

{¶27} In any case, in determining whether an erroneous jury instruction was prejudicial, the reviewing court is to view the jury instructions in their entirety. *State v. Getsy* (1998), 84 Ohio St.3d 180, 196 (other instructions in the case can limit any prejudicial effect of erroneous instructions). Thus, if the instructions, as a whole, correctly conveyed the state's beyond a reasonable doubt burden to the jury, then the improper portion can be viewed as harmless error.

{¶28} Here, the trial court repeatedly instructed the jury that the state had to prove the elements beyond a reasonable doubt. (Tr. 178-179, 180). The trial court properly defined this standard to the jury. (Tr. 179). See R.C. 2901.05(D) (providing the proper definition). Specifically, the court stated in pertinent part:

{¶29} "The defendant is presumed innocent until her guilt is established beyond a reasonable doubt. The defendant must be acquitted unless the state produces evidence which convinces you beyond a reasonable doubt of every essential element of the crime charged in the complaint.

{¶30} "Reasonable doubt is present when, after you have carefully considered and compared all the evidence, you cannot say you are firmly convinced of the truth of the charge. Reasonable doubt is based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. Proof beyond a reasonable doubt is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his life affairs.

{¶31} "* * *

{¶32} "The defendant is charged with criminal damaging or endangering. Before you can find the defendant guilty, you must find beyond a reasonable doubt, that on or about the 30th day of January, 2006, and in the City of Youngstown, Mahoning County, Ohio, the defendant knowingly caused or created a substantial risk of physical harm to the property of Sharon Slade without Sharon Slade's consent.

{¶33} "* * *

{¶34} "If you find the state proved beyond a reasonable doubt all the essential elements of the offense of criminal damaging, your verdict must be guilty." (Tr. 178-182).

{¶35} Thus, the jury was advised of the proper standard and provided explanations on what such standard entails. Other courts have concluded that an erroneous civil instruction such as the one given here was harmless where the remainder of the instructions provided the proper state's burden. See, e.g., *Doan*, 12th Dist. No. CA97-12-014; *Coe*, 3d Dist. No. 13-97-46.

{¶36} "When reviewing the context of the overall charge, one erroneous instruction was insufficient to mislead the jury or to taint the entire pool of instructions when, otherwise, the proper instructions regarding the reasonable doubt burden of proof and evidentiary standard were provided to the jury." Coe, *supra*.

{¶37} In accordance, we find that the instructions, as a whole, properly conveyed that the state's burden of proof was that of beyond a reasonable doubt. We thus conclude that prejudice was lacking. Regardless, plain error will not be recognized under the circumstances of this case.

ASSIGNMENT OF ERROR NUMBER THREE

{¶38} Appellant's third assignment of error alleges:

{¶39} "THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT/APPELLANT'S CRIMINAL RULE 29 MOTION FOR JUDGMENT OF ACQUITTAL; ALTERNATIVELY, THE DEFENDANT/APPPELLANT'S CONVICTION IS BASED UPON INSUFFICIENT EVIDENCE AND THEREFORE MUST BE REVERSED."

{¶40} An appellate court reviews a denial of a Crim.R. 29 motion for acquittal under the same standard used to review a sufficiency of the evidence claim. *State v.*

Carter (1995), 72 Ohio St.3d 545, 553; *State v. Mayas* (Dec. 6, 2000), 7th Dist. No. 98JE14. Sufficiency of the evidence is a legal test dealing with adequacy, as opposed to weight of the evidence. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. A conviction will not be reversed on insufficiency grounds unless the reviewing court determines, after viewing the evidence in the light most favorable to the prosecution, that no rational trier of fact could find that the elements of the offense were proven beyond a reasonable doubt. *State v. Goff* (1998), 82 Ohio St.3d 123, 138. In other words, the evidence is sufficient if, after viewing the evidence in the light most favorable to the state, reasonable minds can reach different conclusions as to whether each element has been proven beyond a reasonable doubt. *Carter*, 72 Ohio St.3d at 553; *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 263.

{¶41} The jury was advised that the complaint alleged that appellant knowingly caused or created a substantial risk of physical harm to the property of Ms. Slade without Ms. Slade's consent. (Tr. 180). See, also, R.C. 2909.06(A)(1). Appellant believes that the evidence was insufficient to show that the damaged property belonged to Ms. Slade because she testified on cross-examination that she rented the house. (Tr. 127). However, there are two flaws to this argument.

{¶42} First, it has been stated that the right of possession alone is a sufficient property interest to protect one against the crime of criminal damaging. *State v. Garber (*1998) 125 Ohio App.3d 615, 618 (for purposes of criminal damaging, property interests in leased truck belonged to both lessee and leasing agency); *Dayton v. Wells* (May 29, 1992), 2d Dist. No. 12862 (holding that there is no merit to the position that only the actual owner of the video recorder may assert the damage or indicate the lack of consent to the unlawful act as all lesser degree of possessory rights are included); *State v. Russell* (1990) 67 Ohio App.3d 81, 85 (possession of a vehicle is a sufficient property interest to protect one against the crime of criminal mischief, which offense also has property of another as an element). See, also, *State v. Gray* (June 8, 2001), 7th Dist. No. 99BA35 (allowing tenant to consent to damage of rental property); *State v. Maust* (1982), 4 Ohio App.3d 187, 189.

{¶43} Here, Ms. Slade testified that she lived in the house and was responsible for the window. (Tr. 101, 114-115, 117, 127). In fact, the window remained boarded

up from January until April when she was able to save enough money to have the window replaced. She then paid for the repair with her own money. (Tr. 114-115). All of this provides sufficient evidence of her possessory right in the property for purposes of the criminal damaging or endangering statute.

{¶44} Second, the offense of criminal damaging or endangering is committed not just by damaging property but also by creating a substantial *risk* of harm to property. Ms. Slade disclosed that the large rock landed in the living room near her television. (Tr. 109). The act of throwing this heavy object through a large living room picture window into an occupied home sufficiently shows a substantial risk of physical harm to the contents of that room (not to mention the people within the room). As such, appellant's argument is without merit.

ASSIGNMENT OF ERROR NUMBER FOUR

{¶45} Appellant's fourth assignment of error contends:

{¶46} "THE DEFENDANT/APPELLANT'S CONVICTION IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶47} Weight of the evidence deals with the inclination of the greater amount of credible evidence to support one side of the issue over the other. *Thompkins*, 78 Ohio St.3d at 387. In conducting this review, the appellate court reviews the entire record, weighs the conflicting evidence, considers credibility and contemplates all reasonable inferences in order to determine whether the trier of fact clearly lost its way and created a manifest miscarriage of justice. Id. Where a criminal case is tried by a jury, only a unanimous appellate court can reverse on the ground that the verdict is against the manifest weight of the evidence. Id. at 389. This decision to act as the "thirteenth juror" is made only in exceptional circumstances. Id. at 387.

{¶48} When there are two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, it is not our province to choose which one should be believed. *State v. Gore* (1999), 131 Ohio App.3d 197, 201. Rather, we defer to the jury who was best able to weigh the evidence and judge the credibility of witnesses by viewing the demeanor, voice inflections, and gestures of the witnesses testifying before it. See *Seasons Coal Co. v. Cleveland* (1994), 10 Ohio St.3d 77, 80; *State v. DeHass* (1967), 10 Ohio St.2d 230, 231.

{¶49} Appellant states that her conviction is contrary to the manifest weight of the evidence because Ms. Slade only saw appellant leaving after the incident and did not see her throw the rock. (Tr. 129). She claims that Ms. Slade did not like her and that Ms. Slade's testimony was not credible. (Tr. 116). Appellant points to Ms. Slade's untrue pretrial statement indicating that she had a videotape of the incident and an incorrect statement in the police report that appellant called her after the incident.

{¶50} Regarding the statement about the videotape, Ms. Slade explained that she was being sarcastic at the pretrial because she thought that defense counsel was also being sarcastic when he asked her if she had video surveillance at her residence. (Tr. 125, 131). Thus, she explained why she answered defense counsel's question in the affirmative even though she had no such video.

{¶51} In any event, a reasonable juror could judge Ms. Slade's testimony to be credible and could conclude that the evidence established that it was in fact appellant who threw the rock. Circumstantial evidence has the same probative value as direct evidence. *State v. Treesh* (2001), 90 Ohio St.3d 460, 485. Considering the relationship history of the individuals, the events that took place earlier in the day, appellant's presence at the scene in the middle of the night and appellant's cursing at Ms. Slade before she drove away, a rational fact-finder could find appellant guilty of criminal damaging or endangering. This assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER FIVE

{¶52} Appellant's fifth assignment of error provides:

{¶53} "THE TRIAL COURT ERRED WHEN IT ALLOWED INTO EVIDENCE TESTIMONY REGARDING INTOXICATION OF DEFENDANT/APPELLANT CONTRARY TO RULE 403(A) OF THE OHIO RULES OF EVIDENCE AND IN VIOLATION OF THE REQUIREMENT THAT HEARSAY TESTIMONY BE EXCLUDED AS SET FORTH IN RULE 802 OF THE OHIO RULES OF EVIDENCE."

{¶54} Ms. Slade testified about the incident between her daughter and appellant earlier in the day. She believed that she told appellant that she should go home because she was intoxicated. When the prosecutor asked how Ms. Slade knew appellant was intoxicated, she responded, "Because the police had said she was drinking." (Tr. 106).

{¶55} Appellant argues that this testimony violated two evidentiary rules. First, appellant believes that the probative value of the first statement that appellant was intoxicated was substantially outweighed by the danger of unfair prejudice, confusion of the issues or of misleading the jury. See Evid.R. 403(A). Second, appellant urges that the second statement that the police said appellant was intoxicated constituted inadmissible hearsay under Evid.R. 802.

{¶56} However, appellant failed to object to this testimony below. Thus, this issue is waived for purposes of appeal. Evid.R. 103(A)(1) (error may not be predicated upon a ruling which admits evidence unless a substantial right of the party is affected, and a timely objection or motion to strike appears of record). We thus can only review for plain error.

{¶57} As to appellant's first argument, Ms. Slade's testimony was probative of background, state of mind and motive. That is, it descriptively provided the interactions of the victim and her family with appellant in the hours prior to the incident and helped provide motive. In addition, appellant's intoxication tends toward explaining why a person would engage in this act of criminal damaging or endangering. Even if there had been an objection, the trial court would not have abused its discretion by allowing such testimony in under Evid.R. 403(A).

{¶58} Regarding appellant's second argument, the statement did in fact constitute hearsay. However, if an objection had been entered, Ms. Slade may have been able to testify that she also personally witnessed indicators that appellant was intoxicated. She knew her well, she heard her yelling and she spoke with her by telling her to go home. As such, we refuse to exercise our discretionary power to recognize plain error as there is no apparent manifest miscarriage of justice. This assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER SIX

{¶59} Appellant's sixth assignment of error provides:

{¶60} "THE STATE OF OHIO COMMITTED PROSECUTORIAL MISCONDUCT IN ITS CLOSING ARGUMENT WHEN IT IMPROPERLY COMMENTED UPON THE CREDIBILITY OF SHARON SLADE WITH RESPECT TO THE PROSECUTOR'S PERSONAL BELIEFS."

{¶61} Appellant complains that the prosecutor committed prejudicial prosecutorial misconduct when he stated in closing that he believed Ms. Slade's testimony was credible. (Tr. 162). In reviewing a prosecutor's alleged misconduct in closing arguments, the court looks at whether the prosecutor's remarks were improper and whether those remarks affected substantial rights of the defendant. *State v. Smith* (1984), 14 Ohio St.3d 13, 14-15. Thus, reversal is not warranted unless the conduct complained of deprived the defendant of a fair trial. *State v. Fears* (1999), 86 Ohio St.3d 329, 332. If in the context of the entire trial it appears clear beyond a reasonable doubt that the jury would have found the defendant guilty even without the improper comments, then the comments can be considered harmless. *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, ¶121.

{¶62} As appellant points out, it is improper for a prosecutor to express his or her personal belief or opinion as to the credibility of a witness. *Smith* (1984), 14 Ohio St.3d at 14. However, appellant failed to object to the prosecutor's statement. (Tr. 162). The failure to object to prosecutorial misconduct waives all but plain error. *State v. Hanna*, 95 Ohio St.3d 285, 2002-Ohio-2221, ¶77, 84. The prosecutor's single sentence in closing arguments expressing his belief that the victim's testimony was credible, although improper, does not warrant our discretionary use of the plain error doctrine.

ASSIGNMENT OF ERROR NUMBER SEVEN

{¶63} Appellant's seventh and final assignment of error alleges:

{¶64} "DEFENDANT/APPELLANT WAS DENIED A FAIR TRIAL DUE TO THE CUMULATIVE EFFECT OF THE ERRORS AS SET FORTH HEREIN."

{¶65} The Supreme Court has held that it is not enough to simply "intone the phrase cumulative error." *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, ¶197. Thus, where an appellant raises the doctrine without further analysis, the assignment of error has been held to lack substance. Id., citing *State v. Sapp*, 105 Ohio St.3d 104, 2004-Ohio-7008, ¶103. Here, appellant cites the doctrine of cumulative error and asks for reversal without citation to the errors or an analysis of the cumulative effect of those errors. Thus, this assignment of error has no substance under *Bethel* and *Sapp*.

{¶66} Regardless, the errors recognized above (regarding inclusion of a civil jury instruction on inference, the mention of hearsay evidence of appellant's intoxication and the prosecutor's comment in closing on the victim's credibility) do not rise to the level of cumulative error. This is especially true considering the fact that no objections were raised to the aforementioned errors. Although the cumulative error doctrine asks whether the outcome of the trial would have been different but for the combination of the separately harmless errors, the plain error doctrine is still a consideration in a cumulative error analysis. See, e.g., *State v. Dubose* (June 6, 2002), 7th Dist. No. 00CA60, ¶122. Considering the evidence against the defendant, this case does not warrant the discretionary application of the plain error doctrine to reverse on the cumulative effect of the waived errors recognized herein.

{¶67} For the foregoing reasons, the judgment of the trial court is hereby affirmed.

DeGenaro, P.J., concurs.
Donofrio, J., concurs.