[Cite as *State v. Morris*, 2009-Ohio-3326.]

STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	CASE NO. 08 CO 7
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	O P I N I O N
	)	
CHRISTOPHER MORRIS,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court, Case No. 07CR81.

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

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JUDGES:

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

Dated: June 30, 2009

VUKOVICH, P.J.

¶{1} Defendant-appellant Christopher Morris appeals from the jury decision in the Columbiana County Common Pleas Court finding him guilty of one count of aggravated vehicular homicide, three counts of aggravated vehicular assault, and one count of failure to stop after an accident. Three issues are raised in this appeal. The first is whether the trial court erred in denying Morris' motion to suppress certain statements made by him to Trooper Barry Thompson on the way to Columbiana County Jail after Morris was read his rights and *Mirandized.* More specifically, whether the trial court's determination that the statements were voluntarily made by Morris in a conversation started by him was an incorrect determination. The second issue is whether Morris' due process rights at the suppression hearing were violated when the trial court allowed the testimony of Beaver Township Patrol Officer Brian Hartman to be conducted by telephone outside its view, but in the view of Morris, his attorney, and the prosecutor. Or, in other words, did it violate Morris' right to due process if the trial court could hear, but not see the witness testify at the suppression hearing? The third issue is whether the prosecutor committed misconduct during the entire trial which deprived Morris of a right to a fair trial. For the reasons expressed below, this court finds that Morris' arguments fail and that the suppression ruling and the conviction are hereby affirmed.

STATEMENT OF THE CASE

¶{2} On March 2, 2007, the Columbiana County Grand Jury indicted Morris for one count of aggravated vehicular homicide caused by driving while under the influence of alcohol, a violation of R.C. 2903.06(A)(1)(a), a second degree felony; three counts of aggravated vehicular assault, violations of R.C. 2903.08(A)(1)(a), third degree felonies; one count of failure to stop after an accident, a violation of R.C. 4549.02(A), a first degree misdemeanor; and one count of aggravated vehicular homicide by recklessly operating a vehicle, a violation of R.C. 2903.06(A)(2), a third degree felony.

¶{3} This indictment was the result of a car accident that occurred on July 16, 2006, in the northbound lane of State Route 11 in Columbiana County just south of the Mahoning County line. Morris was driving a white Ford utility bucket truck and hit the

rear right end of a white Ford minivan driven by Allison Macke. Three passengers were in Macke's vehicle: Sam Macke, Zach Doran and Sara Kinner. At the time of the accident, the Macke vehicle was having some type of engine trouble that resulted in the vehicle traveling at 20 to 25 mile per hour. As such, Allison was driving the vehicle in the right lane with the flashers activated.

¶{4} The impact of the hit tore open the back end of the minivan and caused it to flip and eventually land on the northbound side of the median strip on its roof. Sam Macke was ejected from the vehicle and found lying in the roadway; he sustained massive injuries and was dead when medical personnel arrived. Zach Doran and Sara Kinner were also ejected from the vehicle, but they were found in the median strip. Allison Macke testified that she was not ejected from the vehicle but climbed out of it after the crash to find the others. When medical personnel arrived they found her lying down in the median strip. Zach, Sara and Allison all survived the accident; however, they sustained varying degrees of injuries.

¶{5} The crash also caused damage to the front end of the white bucket truck. It stopped in the median strip facing northbound but was on the southbound side of the median strip. A lot of debris was found at the scene including Bud Light beer cans; one open Bud Light beer can in a blue coozy was found in the cab of the white bucket truck.

¶{6} When medical personnel, troopers, and officers arrived on the scene Morris was not present. Thus, a search began for him. Morris was found by Beaver Township Officer Brian Hartman walking alongside the road on State Route 14. Morris asked Officer Hartman to take him back to the scene of the crash and asked how the girl was, "the one I ran over and killed." (Suppression Tr. 201; Trial Tr. 416). Officers testified that they took this statement to refer to Sam Macke because he had long hair and given the position that his body was found in, it was not clear that he was a male.

¶{7} Morris was then taken to the scene of the crash, attended to by emergency personnel, and taken to Salem Community Hospital. Some of the officers who came into contact with Morris prior to him being transported to the hospital detected an odor of alcohol on his breath. (Trial Tr. 390, 396-397 (Trooper Tom Gerber), 420 (Officer Hartman).

¶{8} While at the hospital, Morris was read his *Miranda* rights and placed under arrest. Troopers Barry Thompson and Vicki Casey attempted to interview

Morris and also requested a blood test for alcohol. Morris invoked his right to remain silent and refused the blood test. These troopers observed, in their limited conversations with Morris, an odor of alcohol emanating from his breath and that his eyes were red and glassy. (Trial Tr. 276-277, 434-435).

¶{9} After hospital testing was completed, Morris was released into the custody of Trooper Thompson and transported to the Columbiana County Jail. While on the way to jail, Morris made some comments to Trooper Thompson; he talked about Jamboree in the Hills, where he had been over the weekend and told Trooper Thompson that he would take responsibility for the car accident, but he did not want to that night. (Suppression Tr. 32).

¶{10} Prior to trial, Morris moved to suppress any statements he made to the officers he came into contact with and any of the officers' observations. The suppression hearing occurred on October 24, 2007; every witness's testimony except for Officer Hartman's, who was not able to be present that day, was taken. The hearing was continued until October 30, 2007 and Officer Hartman's testimony was taken that day. As the trial judge was on vacation, he presided over Officer Hartman's testimony via telephone.

¶{11} Following the suppression hearing, the trial court held that statements made to Officer Hartman when he picked up Morris walking alongside State Route 14 were not suppressed because at that point Morris was not in custody. Statements made to Trooper Casey at the hospital were suppressed; however, her observations and the observations of the other officers were not. Statements made to Trooper Thompson on the way to the Columbiana County Jail were admissible because the court found that Morris initiated the conversation and that conversation was voluntary. 11/08/07 J.E.; 01/03/08 J.E. Thus, the suppression order was granted in part and denied in part.

¶{12} Trial began on November 5, 2007. Following presentation of all the evidence, the state dismissed the sixth count of the indictment that charged Morris with aggravated vehicular homicide that resulted from reckless operation of a vehicle. The jury found Morris guilty of the remaining five counts. 11/09/07 J.E.

¶{13} Sentencing occurred on January 9, 2008; Morris received an aggregate sentence of 10 years and a lifetime driver's suspension. He was sentenced to seven years for aggravated vehicular homicide, three years for each aggravated vehicular

assault conviction, and 180 days for failure to stop after an accident. The aggravated vehicular assault convictions were ordered to be served concurrently to each other but consecutive to the aggravated vehicular homicide conviction. The sentence for failure to stop after an accident was ordered to be served concurrently with the sentence for the aggravated vehicular homicide conviction. Morris' driver's license was suspended for the balance of his life for the aggravated vehicular homicide conviction and a 10 year suspension was ordered for each aggravated vehicular assault conviction. The suspensions for aggravated vehicular assault convictions were ordered served consecutively to each other but concurrently with the lifetime suspension. Morris now timely appeals from the suppression order and conviction.

¶{14} Prior to addressing the assignments of error, we take this opportunity to address whether there is a final appealable order in compliance with the Ohio Supreme Court's ruling in *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330. In *Baker*, the Ohio Supreme Court held that in order for a judgment of conviction to be a final appealable order under R.C. 2505.02, it must be a "single document" that includes "the sentence and the means of conviction, whether by plea, verdict or finding by the court." Id. at ¶17. In the case at hand, there is the conviction judgment entry and the sentencing judgment entry. At the beginning of the sentencing entry, it does not state the means of conviction, i.e. by a jury. However, on the final page of that entry, when the trial court is discussing that it advised Morris of his right to appeal, the judgment states, "was advised of his right to appeal the jury's decision and the Court's sentence." This is an indication of the means of conviction and as such complies with *Baker*. However, we note that the order could have been done more definitely and in order to prevent a delay in the appeal process with a limited remand to issue a final appealable order, trial courts should be careful to definitively state the means of conviction and sentence in the same order.

FIRST ASSIGNMENT OF ERROR

¶{15} "THE TRIAL COURT ERRED WHEN IT ADMITTED VARIOUS STATEMENTS INTO EVIDENCE THAT WERE OBTAINED FROM MR. MORRIS IN CONTRAVENTION OF HIS PRIVILEGE AGAINST SELF-INCRIMINATION, AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION. (JANUARY 3, 2008 JUDGMENT ENTRY)."

¶{16} In the suppression motion, Morris made various arguments concerning statements he made to troopers and officers that according to him should have been suppressed. As stated above, only the statements made to Trooper Casey were suppressed. On appeal, Morris solely argues that the trial court erred when it denied his suppression motion concerning statements made to Trooper Thompson while en route to the Columbiana County Jail.

¶{17} "Appellate review of a ruling on a motion to suppress presents a mixed question of law and fact. *State v. Long* (1998), 127 Ohio App.3d 328, 332. At a suppression hearing, the evaluation of evidence and the credibility of witnesses are issues for the trier of fact. *State v. Mills* (1992), 62 Ohio St.3d 357, 366. We are bound to accept the trial court's factual determinations made during the suppression hearing so long as they are supported by competent, credible evidence. *State v. Harris* (1994), 98 Ohio App.3d 543, 546. Accepting these factual findings as true, an appellate court must then independently determine as a matter of law, without deference to the trial court's conclusion, whether the trial court erred in applying the substantive law to the facts of the case. Id." *State v. Reed*, 7th Dist. No. 05HA575, 2005-Ohio-6791, ¶7.

¶{18} Likewise, we have explained that when determining whether the trial court erred in its suppression ruling, it is the motion to suppress and the suppression transcripts that govern our decision, not the trial transcript. *State v. Scott*, 7th Dist. No. 99CA324, 2001-Ohio-3417, ¶13.

¶{19} With that standard in mind, we now review whether the trial court erred in denying the motion to suppress the statements made to Trooper Thompson. Morris contends that Trooper Thompson's actions en route to the Columbiana County Jail violated his *Miranda* rights as explained by *Rhode Island v. Innis* (1980), 446 U.S. 291.

¶{20} In *Innis*, Innis was arrested for armed robbery, advised of his *Miranda* rights and placed in a patrol car with three officers. When he was arrested, Innis was unarmed. While en route to the police station, two of the officers had a conversation where they were discussing that they needed to go back to the area to search for the gun. They made statements about how in that area there was a school for handicap children and it would be horrible if one of those children found the gun and accidently got shot. Innis interrupted the conversation and stated that they should turn the car around and return to the scene of the arrest so that he could show them where the gun

was. At the scene, Innis was once again Mirandized; he indicated he understood his rights but he "wanted to get the gun out of the way because of the kids in the area in the school." He then led them to the gun.

¶{21} The United States Supreme Court addressed the meaning of "interrogation" under *Miranda*. The Court held that interrogation meant not only express questioning by the officers while a defendant was in custody, but also referred to the "functional equivalent" of express questioning, which is "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." Id. at 301.

¶{22} It explained that the "functional equivalent" of questioning "focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response." Id. at 301-302. Thus, not all statements obtained by the police after a suspect is taken into custody are considered the product of interrogation; "statements given freely and voluntarily without any compelling influences" are admissible evidence. Id. at 299-300, quoting *Miranda v. Arizona* (1966), 384 U.S. 436, 478.

¶{23} Then taking the facts of the case into consideration, the Court concluded that Innis had not been interrogated either expressly or by the "functional equivalent" of questioning. It explained, concerning the "functional equivalent" of questioning, that nothing in the record suggested that the officers were aware that Innis was susceptible to an appeal to his conscience concerning the safety of handicap children nor did the record suggest that Innis was unusually disoriented or upset at the time of his arrest. *Innis*, 446 U.S. at 302-303.

¶{24} It is undisputed in this case that at the time of the "conversation" between Trooper Thompson and Morris, Morris was in custody, had been advised of his

Miranda rights and invoked his right to remain silent. The question then becomes was the "conversation" an interrogation. Morris contends it was because Trooper Thompson's words and actions while taking him to jail were "reasonably likely to elicit an incriminating response."

¶{25} In determining whether conduct qualifies as "reasonably likely to elicit an incriminating response" depends on an examination of the facts and circumstances of each case. *State v. Butts* (Mar. 7, 2000), 10th Dist. No. 99AP-576.

¶{26} During the suppression hearing, Trooper Thompson testified about the conversation that occurred during Morris' transport to the Columbiana County Jail.

¶{27} "Q. Okay. Did you speak with the Defendant en route to the Columbiana County Jail?

¶{28} "A. Yes, I did.

¶{29} "Q. Did he make any statements to you as – did you question the Defendant?

¶{30} "A. No, we were driving down the road and he began speaking to me.

¶{31} "Q. What did he say to you?

¶{32} "A. We were just – we were driving down the road to the jail. He stated, uh, that he had – well, we was talking about him being at Jamboree in the Hills earlier that day. Uh, and I had asked him who was performing at the Jamboree and he stated, 'Clint Black was.'

¶{33} "He continued by saying there are many things to – that he saw down there. He started telling me just a couple of the odd things he saw; he said, 'He saw a guy with a watermelon on his head, and another guy walking around with a hat with horns on it.'

¶{34} "He told me that 'Most people go down there as a couple, but he enjoyed going down there because there was many nice looking women to see.'

¶{35} "Later he told me, there was a pause now. Later on in the drive he had stated to me, 'He would like to talk to someone, but he didn't know who to speak with.' I asked him, 'If he would want a counselor?' And he said, 'No, I do not.' I told him, 'If he was ready to take responsibility for the actions of the day I would stop the car and listen to him, and talk to him, whatever he wanted to tell me.' But he said, 'He was going to take responsibility for it, but didn't want to – did not want to tonight.'

¶{36} "* * *

¶{37} "Q. Did he make theses statements to you voluntarily and – I don't want you to misunderstand the question.

¶{38} "Did he volunteer these statements to you, or were these statements that he made to you a response to an interrogation that you put to him?

¶{39} "A. No. These were just conversations that he initiated, just back and forth talking on the way down to the county jail. There was no interrogation, just – he was just telling me about the accounts of the day." (Suppression Tr. 31-33).

¶{40} Later, on cross-examination, Morris referred Trooper Thompson to the sequence of events which was a report of the events that occurred between Trooper Thompson and Morris on the evening after the crash.

¶{41} "Q. And what does this entry seem to indicate at 9:55 p.m.?

¶{42} "A. Would you like me to read the whole paragraph?

¶{43} "Q. Please.

¶{44} "A. 'I arrested Christopher Morris and transported him to the Columbiana County Jail. On the way to the jail I asked Christopher who was performing at the Jamboree in the Hills today? He said, 'Clint Black was there.' He continued by saying, 'There are many interesting things to see there.' He said, 'He saw a guy with a watermelon on his head, and another with horns.' He said, 'Most people go as a couple, but there are many nice looking women.' Later he said, 'I want to talk to someone, but I do not know who.' I asked if he wanted a counselor? He said, 'No, I do not.' I told him if – I told him if he was ready to take responsibility for his actions today I would stop the car and listen to whatever he had to say. He said, 'No, I'm going to take responsibility for it, but not tonight.'" (Suppression Tr. 41-42).

¶{45} The testimony shows that Morris and Trooper Thompson had a conversation about Jamboree in the Hills. Then there was a pause and later on Morris continued the conversation or started another conversation about wanting to talk to someone. This discussion resulted in Morris making the incriminating statement that he would take responsibility for the car wreck, but that it would not be that night.

¶{46} As explained above, the key in determining whether Morris' statement about taking responsibility should have been suppressed is whether Trooper Thompson's comments to Morris while en route to the county jail were reasonably likely to elicit an incriminating response. However, considering all of the other overwhelming evidence of guilt we do not need to decide whether the back and forth

between Morris and the trooper en route to the county jail was an impermissible interrogation, i.e. that the trooper's statement to Morris about talking to him was likely to elicit an incriminating response. Any possible error in failing to suppress the statement was harmless. See, *State v. Williams,* 99 Ohio St. 3d 439, 2003-Ohio-4164, ¶37 (error in admitting confession harmless).

¶{47} Officers who came into contact with Morris noticed an odor of alcohol emanating from Morris' person. (Trial Tr. 276-277, 434-435). They also noticed that his eyes were red and glassy. (Trial Tr. 276-277, 434-435). Furthermore, at the accident scene multiple beer cans were found and in particular one can was found open in a blue cozy in Morris' truck. There was also evidence about how Morris was driving prior to the wreck. Leona Hipple testified that Morris was traveling at a high rate of speed and almost hit her car. (Trial Tr. 450). Allison Macke also testified about how her vehicle was traveling immediately prior to the accident. She stated she was traveling in the right hand lane at a low rate of speed with her flashers on. The crash reconstructionist officer confirmed her testimony regarding how she was traveling. When all of that evidence is viewed together it tends to show that Morris was impaired. Furthermore, he made a statement to Officer Hartman, prior to being Mirandized, asking how "the girl" was that "he ran over and killed." The officer took this as a statement about Sam Macke, because he had long hair. The statement made by Morris to Officer Hartman, while it does not discuss responsibility, is just as incriminating as the statement he made to Trooper Thompson about taking responsibility. His statement to Officer Hartman, the other officers' observations regarding impairment, the beer cans found in and near the truck at the accident scene, and other witnesses' testimony, render any error in failing to suppress the statement made to Trooper Thompson en route to the county jail harmless. This assignment of error lacks merit.

SECOND ASSIGNMENT OF ERROR

¶{48} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR AND DENIED MR. MORRIS DUE PROCESS OF LAW WHEN IT CONDUCTED A SUPPRESSION HEARING BY TELEPHONE. FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION; SECTION 16, ARTICLE I OF THE OHIO CONSTITUTION; CRIM.R. 52(A); SUPP. HRG. T. 136-144."

¶{49} The suppression hearing was held on October 24, 2007. At that hearing it was discussed how one of the state's witnesses, Officer Hartman, would be unable to testify on that date because he was attending a D.A.R.E. seminar. Thus, after the state presented all of its witnesses and Morris presented his witness, the trial court continued the suppression hearing until October 30, 2007. On that date, Officer Hartman's testimony was presented. The prosecutor, defense counsel and Morris were all present during this testimony. However, the trial court, which was on vacation, presided over the matter via telephone.

¶{50} Morris contends that since the trial court was unable to be present at the hearing, and thus could not view the testimony of the witness, which is needed to determine credibility, he was denied due process of law and the conviction must be reversed because the trial court committed prejudicial error. Morris objected to the testimony being taken without the trial court getting to view the testimony. (Suppression Tr. 150-151).

¶{51} As aforementioned, in suppression proceedings, credibility of the witnesses is an issue for the trier of fact. *Mills*, 62 Ohio St.3d at 366. In evaluating credibility, the trial court not only listens to the testimony, but also observes demeanor, voice inflections, and gestures. *State v. Rouse*, 7th Dist. No. 04BE53, 2005-Ohio-6328, ¶33. Thus, it is important for the trial court to also be present at the hearing to view the witness.

¶{52} The cases that discuss due process violations in holding a hearing via telephone are from appeals from administrative hearings. Those cases find that it is not a due process violation because the statutes permit such telephone hearings in the administrative setting. *Wright v. Unemployment Comp. Bd. of Rev.* (1988), 51 Ohio App.3d 45; *Living Care Alternatives of Utica, Inc. v. U.S.* (S.D.Ohio 2004), 312 F.Supp.2d 929, 935. However, a suppression hearing is not an administrative setting and thus, especially in a criminal case, due process may require the trial court to be able to view the witness testifying.

¶{53} Morris cites this court to an Ohio Sixth Appellate District case, *State v. Smith* (1996), 112 Ohio App.3d 413, that he contends supports his contention that his due process rights were violated. In *Smith*, Smith filed a motion to suppress; the motion was referred to a magistrate and the magistrate held a hearing. However, it did not issue findings of fact or conclusions of law or any type of decision. Instead, the

trial court, months later, issued a one sentence judgment entry granting the motion to suppress. The state appealed. The appellate court reversed the decision and held that the magistrate did not have authority to preside over a motion to suppress pursuant to Crim.R. 19(B)(1). In supporting this position, the *Smith* court cited another appellate court case, *State v. Chagaris* (1995), 107 Ohio App.3d 551, where that appellate court determined that the magistrate does not have authority to preside over a motion to suppress. However, the *Chagaris* court determined that the error was harmless because the magistrate issued findings of fact and conclusions of law and the defendant failed to object to the referral of the matter to the magistrate. The *Smith* court, however, distinguished the *Chagaris* holding of harmless error; it stated that unlike in *Chagaris*, the magistrate did not make any findings of fact and conclusions of law or any type of decision, rather it was the trial court, who did not view any of the witnesses, that made a ruling. The *Smith* court then explained, "Because the credibility of the witnesses who testified at the motion to suppress was determinative of the motion, we cannot find that the error in referring the matter to a magistrate was harmless." *Smith*, 112 Ohio App.3d at 416.

¶{54} As can be seen from the case review, the reversal in *Smith* was based on the magistrate lacking authority to preside over a suppression motion. Admittedly, the case does state that such action was not harmless because the trial court did not get to view the witnesses. This does provide some indication that a trial court should get the opportunity to view the witness to determine credibility. Thus, the trial court hearing the testimony via telephone probably does not satisfy the requirement.

¶{55} Regardless of the above, any error was invited in this instance. During the discussion of how Officer Hartman's testimony was going to be taken, Morris objected to the trial court solely hearing the testimony of Officer Hartman via telephone and not getting to view the testimony.

¶{56} "MR. STACEY [counsel for Morris]: Well, the only objection that I would have would simply be because this Court is going to be ruling on a very important issue in this case, uh, I think that it's important for the Court to be able to see the witness testify, his mannerism, and those things as to being able to judge the credibility of this witness, even at a motion hearing. That's my only concern.

¶{57} "I understand the logistics involved, but for the record I guess I would prefer to have this – I guess we could do it both ways, have this videotaped, you could hear it and if you needed to view it upon your return, something along those lines.

¶{58} "But I would like to have it –

¶{59} "THE COURT: – well, I –

¶{60} "MR. STACEY: – both ways.

¶{61} "THE COURT: I will take that as an objection to my procedure, without a videotape, or me being present live to hear the witness, correct?

¶{62} "MR. STACEY: Correct.

¶{63} "THE COURT: * * *

¶{64} "Mr. Stacey, if you want the matter videotaped, you're welcome to have someone there to videotape it at that time.

¶{65} "And I will be, I'm not going to be . . . I am not going to be in a third world country. I will be in the United States, so, if you want to videotape it on Monday, if we can do this Monday and overnight that videotape to me to review on Tuesday I will be happy to do that.

¶{66} "MR. STACEY: Okay." (Suppression Tr. 150-152).

¶{67} Thus, the trial court agreed that a videotape of the testimony in addition to holding the hearing via telephone could be done. The videotape would have remedied the trial court's inability to view the testimony and would have permitted it to judge credibility by seeing the witness' demeanor and gestures.

¶{68} Yet, when the hearing resumed on October 30, 2007, the testimony was not recorded by video. The trial court, not knowing that it was not being recorded, asked Morris' counsel whether the video was being shipped overnight to him to review, and counsel responded that it was not.

¶{69} "THE COURT: [Mr.] Stacey, did you videotape this?

¶{70} "MR. STACEY: No. No need." (Suppression Tr. 224).

¶{71} Thus, while the trial court stated it would review the video to remedy viewing the witness' testimony, Morris stated that it was not needed. Morris makes no argument that had the testimony been videotaped that this would not have remedied any concern as to the trial court getting to view the witness' testimony. Consequently, if there was any error, it was invited.

¶{72} In addition to the above argument, Morris also contends that the fact that Officer Hartman would not be able to testify at the October 24, 2007 hearing was a surprise to him because he did not learn about it until that day. His contention is not supported by the record because it clearly confirms that at least one day prior to the hearing all parties were aware that Officer Hartman would not be able to testify that day.

¶{73} For instance, at the beginning of the hearing when Trooper Thompson was testifying as to what Officer Hartman observed when he located Morris, counsel for Morris objected. During this objection, Morris' counsel clearly indicated that he was aware that Officer Hartman would not be testifying that day.

¶{74} "MR. STACEY [counsel for Morris]: I think Officer Hartman is the individual that we're going to have testify as – by video, or however, and I would prefer to hear his testimony with regards to what he told Officer Thompson." (Suppression Tr. 11-12).

¶{75} Likewise, later on in the hearing after the state's last witness for the day was called, the attorneys and the court had a discussion on the record regarding Officer Hartman's testimony. In that discussion, it is clear that prior to the day of the hearing all parties involved, including the court, were aware that Officer Hartman would not be able to testify that day.

¶{76} "MR. GAMBLE: Yes, so, the record is clear, Patrolman Hartman, as the Court is already aware now was the – I will tell you he was the first officer at the scene of the crash, and he was also the officer who discovered the Defendant as it's been described.

¶{77} "Patrolman Hartman, for the past ten days has been attending a school for . . .

¶{78} "THE COURT: D.A.R.E.

¶{79} "MR. GAMBLE: "D.A.R.E. I had M.A.D.D. in my head. For D.A.R.E., the state sponsored D.A.R.E. Program, and he's informed me, and I have confirmed that if he misses even a portion of the sessions, and they last all day for two solid weeks, that he has to, and the department has to foot the bill for him to go back to Columbus and take the entire program all over again, and so I tried to, with some maneuvering here, tried to secure his testimony here today in many different ways. I know we've discussed taking some of his testimony over the phone. It's been objected to by

counsel, understandably. We've thought about several different ways to secure his appearance that wouldn't interrupt his classes. I understand the Court, perhaps has some other ideas about that, and whatever the Court orders I indicated – I also indicated that – to the Court and to counsel, that you know, if it was simply a matter that he had to be here today, that there was a subpoena that was delivered to the department, and I would force him to be here. But barring that if we could make some other arrangements I'm happy to do that, and I'm sure that the patrolman is also happy to oblige us in any other way that will save his department for having to foot the bill for two more weeks.

¶{80} "* * *

¶{81} "THE COURT: Well, my proposal is this, as I understand . . . my proposal is this. The problem is, for the record, is that I have long-scheduled, six months ago scheduled vacation next week, and I will not be available next week to have the officer back in here in front of me to testify.

¶{82} "**Yesterday**, I think we discussed this matter off-the-record, and I suggested a deposition of some sort being taken and then the court reporter could transcribe that and fax that to me where I'll be so that I can review it before I make a final decision.

¶{83} "My suggestion is a little bit different. My suggestion is I think we arrange in the conference room where I'm currently using for a hearing room, arrange to do the – to have the officer present, you folks present, and I'll be available by telephone and he can testify over the phone to me. In other words, I'll be listening in – I will actually call in, and he can testify, and then I'll hear him contemporaneously. Rather than have it typed up and sent to me wherever I may be." (Suppression Tr. 144-149 (Emphasis added)).

¶{84} Thus, Morris cannot claim surprise, as he was clearly aware of what was transpiring concerning Officer Hartman's testimony. Consequently, this assignment of error is meritless.

THIRD ASSIGNMENT OF ERROR

¶{85} "INSTANCES OF PROSECUTORIAL MISCONDUCT, WHICH OCCURRED THROUGHOUT THE JURY TRIAL, DEPRIVED MR. MORRIS OF HIS RIGHT TO A FAIR TRIAL. FIFTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION; SECTION 16, ARTICLE I, OHIO CONSTITUTION.

(SUPP. HRG. T. 94-98, 117, 136-144; 210-211; VOL. TWO T. 309-310, 324, 427-428, 438; VOL. THREE T. 454)."

¶{86} Morris claims prosecutorial misconduct occurred throughout the trial: there are allegations of misconduct in direct and cross examination; allegations of discovery misconduct; and allegations of misconduct during closing arguments. Each argument will be addressed in turn. However, before doing so, we note that generally the test for reviewing claims of prosecutorial misconduct is "whether remarks were improper and, if so, whether they prejudicially affected substantial rights of the accused." *State v. Jones,* 90 Ohio St.3d 403, 420, 2000-Ohio-187, citing *State v. Smith* (1984), 14 Ohio St.3d 13, 14. Where it is clear beyond a reasonable doubt that a jury would have found the defendant guilty even absent the alleged misconduct, the defendant has not been prejudiced and his conviction will not be reversed. *Smith*, 14 Ohio St.3d 13. In reviewing allegations of prosecutorial misconduct, the alleged wrongful conduct must be viewed in the context of the entire trial. *Darden v. Wainwright (1986),* 477 U.S. 168.

Direct and Cross Examination

¶{87} Morris cites to multiple instances of misconduct during direct and cross-examination. The first two instances he discusses, he characterizes the misconduct as arguing facts not supported by the evidence or misstatements of fact.

¶{88} Allegedly, the first one occurred during Officer Hartman's testimony. The prosecutor was asking Officer Hartman about his opinion as to whether Morris was intoxicated. The prosecutor was laying out what was found at the scene of the accident: beer cans scattered on the highway, a beer can in the blue coozy that was found in Morris' truck, a cooler of beer cans found in Morris' truck, the fact that Morris left the scene and the fact that other officers had smelled alcohol on Morris' breath. (Trial Tr. 427-428). Morris' counsel objected to the line of questioning; the objection was overruled. (Trial Tr. 428).

¶{89} All of the facts referenced by the prosecutor were supported by some evidence admitted at trial. Trooper Thompson testified that Bud Light beer cans were found in the roadway. (Trial Tr. 272). Trooper Gerber testified that he found a beer can in a blue coozy in the cab of the truck and that a cooler with beer cans was found inside the cab of the truck. (Trial Tr. 382, 383, 398). Officer Hartman testified that Morris had left the scene of the accident and he found Morris walking on State Route

14. (Trial Tr. 409). Both Troopers Gerber and Thompson also testified that they smelled an odor of alcohol emanating from Morris' breath. (Trial Tr. 276-277, 396-397). As the testimony corresponded with the facts presented in the prosecutor's questions to Officer Hartman, there was no mischaracterization of evidence and thus, no misconduct.

¶{90} The second alleged instance of misrepresenting evidence occurred during Trooper Casey's testimony. Morris' counsel was cross-examining Trooper Casey and asking her how she could have observed an odor of alcohol when other officers did not. (Trial Tr. 438). The state objected to the testimony and that objection was overruled.

¶{91} We cannot find any misconduct on the part of the prosecutor in this instance for multiple reasons. First, primarily because it is unclear exactly how the prosecutor did or could have mischaracterized evidence in this instance given that the prosecutor was not even questioning the witness. Second, regardless of that, while admittedly there were officers that testified that they did not smell the odor of alcohol on Morris' breath, there were other officers, besides Trooper Casey, who did smell the odor of alcohol on his breath. For instance, Troopers Gerber and Thompson both testified that they smelled alcohol on his breath. (Trial Tr. 276-277, 396-397). Furthermore, the officers who testified that they did not smell an odor of alcohol on Morris' breath (Officer Hartman and Trooper Bittinger) indicated that after he was removed from the cruiser they did then notice the smell of alcohol in the cruiser. (Trial Tr. 358, 420-421).

¶{92} Next, Morris contends that during direct and cross-examination, "the prosecutor denigrated defense counsel and the court." He cites to two instances, one found during the suppression hearing and one during the trial.

¶{93} The instance that allegedly happened during the suppression hearing occurred while Trooper Casey was testifying. The prosecutor asked a question and referred to Mr. Stacey, defense counsel. Morris objected and the trial court told the attorneys to refrain from making personal comments:

¶{94} "Q. As I'm looking at your report, Mr. Stacey's gonna flip out again maybe, did you have an occasion to speak with him –

¶{95} "MR. STACEY: – Your Honor, I object to the reference of Attorney Stacey –

¶{96} "THE COURT: – yes.

¶{97} "MR. STACEY: – flipping out.

¶{98} "THE COURT: Let's keep the personal asides out of this hearing, both of you." (Suppression Tr. 124).

¶{99} During trial, the prosecutor objected to one of defense counsel's questions presented to Trooper Thompson. In doing so, the prosecutor's reason for the objection was because if defense counsel had objected it would have been sustained:

¶{100} "THE COURT: What's the basis of your objection, Mr. Gamble?

¶{101} "MR. GAMBLE: The basis of my objection, Your Honor, is if I were to ask this witness that question and Mr. Stacey was to object, the objection would be sustained. I see no reason why Mr. Stacey –

¶{102} "THE COURT: – well, I want the legal evidentiary basis for your objection –

¶{103} "MR. GAMBLE: – the evidentiary basis is it is outside this witness' knowledge and it calls for hearsay from this witness.

¶{104} "THE COURT: Well, overruled. Because he's the investigating officer – overruled." (Trial Tr. 309-310).

¶{105} While clearly the prosecutor should have refrained from the personal nature of his comments, when the entire suppression and trial proceedings are considered this court cannot find that the comments made by the prosecutor rise to the level of reversible error. A thorough reading of the suppression and trial transcripts indicates that both the prosecutor and defense counsel made some comments that were personal in nature and each attorney should have refrained from making those comments. However, the comments are few and did not permeate the trial or prejudice Morris; even without the comments, Morris would still have been found guilty. Thus, any argument that the prosecutor committed misconduct by "denigrating defense counsel and the trial court" is not persuasive.

¶{106} In addition to the above references to the transcripts where misconduct allegedly occurred during direct and cross-examination, Morris references in the text of the assignment of error trial transcript page 324 and 454. The body of his argument however, does not make any argument concerning these pages. As to page 324, after reviewing that portion of the transcript, it is unclear what error occurred during the

state's direct examination of its own witness. There are no objections found on that page. Thus, any argument as to that page of the transcript is deemed meritless.

¶{107} As to page 454, this concerns Leona Hipple's testimony. She testified that while she did not see the accident, she was traveling northbound on Route 11 and was passed by a white bucket truck shortly before the accident. She described that she wanted to pass a vehicle in front of her so she checked her mirrors. She saw a white truck in the distance but determined that she had enough time to pass the car in front of her, so she moved into the passing lane. As she was passing the car, she looked in her mirror again and saw that the truck was coming up behind her at a high rate of speed. She explained that she passed the car just in time to get over into the right hand lane so that the truck would not hit her; she stated that her car and the truck were almost bumper to bumper. (Trial Tr. 450).

¶{108} On page 454, the state lodged an objection claiming that Morris' counsel did not lay a proper foundation to refresh Hipple's recollection with the statement she had made to the police. The trial court overruled the objection. It is unclear how any misconduct occurred during this objection or argument presented to the court concerning the objection. Thus, any argument to that page of the transcript is also deemed meritless.

¶{109} In conclusion, all arguments concerning the alleged misconduct during direct and cross-examination fail.

Discovery Misconduct

¶{110} Next, Morris alleges there were multiple instances of discovery misconduct. In addressing a prosecutorial misconduct argument that raises purported discovery violations, we look to the Ohio Supreme Court's holding in *State v. Joseph* (1995), 73 Ohio St.3d 450, for our standard of review. *State v. Oliver*, 7th Dist. No. 07MA169, 2008-Ohio-6371, ¶112.

¶{111} The *Joseph* Court explained that the state's failure to provide discovery will not amount to reversible error unless there is a showing that "(1) the prosecution's failure to disclose was a willful violation of [Crim. R. 16], (2) foreknowledge of the information would have benefited the accused in the preparation of his defense, and (3) the accused suffered some prejudicial effect." *Joseph*, 73 Ohio St.3d at 458.

¶{112} With that standard in mind, we now review his arguments.

¶{113} During Trooper Gerber's testimony, he testified that Morris asked him "Is she okay?" and Morris refused to answer whether he had anything to drink. (Suppression Tr. 98). Morris asked Trooper Gerber if he had provided a synopsis of those statements to the prosecutor and the trooper responded that he had not, but prior to the hearing, he had told the prosecutor about the conversation with Morris. (Suppression Tr. 98). At that point, Morris moved to strike the evidence because the statements were not disclosed during discovery. (Suppression Tr. 99).

¶{114} The state admitted that the statements were not included in the answer to discovery and characterized that failure as an oversight. (Suppression Tr. 100). It explained that the statements were recorded on the cruiser tape, which was included in discovery. Morris did not drop off a blank tape to copy the original until one day prior to the suppression hearing. However, the state admitted that the statements could only be viewed, not heard on the tape. The state viewed the tape a week prior to the hearing and contacted the trooper concerning the remarks. The trial court denied the motion to strike finding there was no prejudice to Morris.

¶{115} Nothing indicates that the failure to disclose a summary of the comments was willful on the part of the prosecutor. It appears from the prosecutor's explanation that he only learned of the comments one week prior to the suppression hearing. Likewise, Morris still had a week to prepare for trial, thus disclosure of the statement at that point did not hinder his defense. In fact, the statement "Is she okay?" is similar to the question made to Officer Hartman asking how the girl was. That question was not suppressed and it occurred within the same time frame as the question made to Trooper Gerber. Consequently, there is also no prejudice because the statements were not made while Morris was in custody. Thus, there was no basis to suppress the statements.

¶{116} The next alleged discovery violation Morris references concerns a portion of Trooper Casey's testimony at the suppression hearing where she was discussing statements Morris made to her. (Suppression Tr. 124-126). At the hearing, Morris claimed that these statements were not disclosed in the summary of Trooper Casey's statement. There is no merit to this argument because the trial court suppressed the statements, thus it cannot be found that any alleged discovery violation concerning those statements resulted in prejudice.

¶{117} Next, Morris contends that a discovery violation occurred when the trial court permitted Officer Hartman's suppression testimony to be postponed until October 30, 2007. (Suppression Tr. 144-153). Morris contends that Officer Hartman's inability to be present at the October 24, 2007 Suppression Hearing was sprung on him on the day of the hearing. As discussed in the previous assignment of error, it is clear that Officer Hartman's inability to be at the suppression hearing was not a surprise; Morris was aware of the situation. Furthermore, from the transcript, it appears that Morris agreed that Officer Hartman's testimony could be taken at a later date. In fact, the trial court granted Morris' request that testimony could be videotaped (in addition to being presided over by telephone) so that the trial court could also review the tape. Morris, however, at the time of Officer Hartman's testimony declined the videotape option, which was clearly at his disposal. Thus, there is no basis for Morris' argument that a discovery violation resulted from Officer Hartman's testimony.

¶{118} The last alleged discovery violation occurred during Officer Hartman's testimony. (Suppression Tr. 210-211). Officer Hartman testified that he wrote a handwritten statement/notes that were made on the night of the accident. (Suppression Tr. 210). During cross-examination, Morris asked the officer if those notes had been provided to the state and the officer indicated that they were provided to the State Highway Patrol. (Suppression Tr. 210). Following that statement, the following colloquy occurred:

¶{119} "MR. GAMBLE: I think Larry [Stacey] – Judge I need to interject here. Larry, I think you had a copy of that at the last hearing, as I recall.

¶{120} "MR. STACEY: Of this officer's –

¶{121} "MR. GAMBLE: – I thought you did –

¶{122} "MR. STACEY: – statement?

¶{123} "MR. GAMBLE: I thought I saw it on your desk.

¶{124} "MR. STACEY: I don't have any notes of this officer.

¶{125} "MR. GAMBLE: All right. All right. That would have come probably with the OH-1 perhaps, I don't know.

¶{126} "Just for the record here, Judge, there's a handwritten statement from which I drafted the . . . summary of statement. Last . . . last week or about – approximately a week ago, I received what Officer Hartman has here with him today, which is a supplement, a typewritten supplement . . . and I'm looking for that right now.

I don't have that in – it's in this file somewhere. But I received that by facsimile from Beaver Township about a week ago.

¶{127} "THE COURT: Did you –

¶{128} "MR. GAMBLE: – I didn't know – I didn't know there was even a type-written supplement. I didn't know until, I think after I spoke to Officer Hartman prior to this hearing about a week ago, up at your office right?

¶{129} "A. [Officer Hartman] Yes Sir.

¶{130} "THE COURT: All right." (Suppression Tr. 210-212).

¶{131} There are two statements that are discussed – a handwritten statement and a typed supplement. Morris might not have had either statement and the only thing he was provided with through discovery was the state's summary of oral statements. The written and typed statement claims that Morris asked the officer how the girl was and when asked what girl, Morris stated the one he ran over and killed. According to the transcript, Morris claimed that the state's summary did not contain those questions and statements. The typed supplement appears to have only been given to the state a week before the hearing.

¶{132} Morris never lodged an objection. Thus, he waives all but plain error. While knowledge of these statements might have been helpful in trying to suppress them, the request still would have been denied because as the trial court found, the statements were made prior to Morris being in custody and thus were admissible. Moreover, this possible failure to disclose does not rise to the level of plain error; it was not prejudicial. If we disregard those statements, there was still other evidence of convictions. The statements made by Morris show he was driving the bucket truck that was involved in the accident. Those statements do not provide any evidentiary value as to his intoxication. Morris' defense was not that he was not involved in the accident, but rather that he was not impaired at the time of the accident. As the statements did not go to his impairment, there was no prejudicial effect. In conclusion, all arguments concerning discovery violations lack merit.

Closing Argument

¶{133} In reviewing closing arguments for prosecutorial misconduct, we must keep in mind the latitude counsel is given during closing arguments and that the closing must be viewed in its entirety in determining whether the complained of

remarks were prejudicial. *State v. Byrd* (1987), 32 Ohio St.3d 79, 82; *Smith*, 14 Ohio St.3d 13.

¶{134} Morris argues that during closing arguments, the prosecutor vouched for the credibility of its witnesses and fabricated evidence. He further argues that the prosecutor committed misconduct by implying that he should be convicted because he failed to take responsibility for his actions.

¶{135} Beginning with the alleged voucher of the state's witnesses' veracity, Morris references pages 654-655 of the trial transcript. During those pages, the prosecutor discusses Hipple's testimony. As previously explained, she testified about her encounter with the white bucket truck, which according to her, almost resulted in an accident. In discussing her testimony, the prosecutor does make a comment that we all have an aunt or mother like Hipple. He also said that she came in and testified about what she saw. Neither of those statements are a clear voucher of her veracity. Likewise, when reading this closing in its entirety, the prosecutor kept telling the jury to use their common sense. Or, in other words, look at all the testimony and see if the evidence showed that Morris was impaired at the time of the accident. Clearly it was the state's position that it was permitted to present that theory to the jury. The prosecution may urge its theory of what the evidence indicates, so long as it does not mislead the jury. *State v. Thomas*, 9th Dist. No. 22340, 2005-Ohio-4265, ¶24. Given the evidence of the odor of alcohol on Morris' breath that was observed by multiple officers, Hipple's testimony about Morris' driving prior to the wreck, Allison's testimony that she was traveling in the right hand lane at a low rate of speed with her flashers on and how the crash reconstructionist officer testified that from the evidence he concluded that the Macke vehicle was traveling in the manner described by Allison, it was not misleading the jury to argue that Morris was impaired.

¶{136} Morris also argues that the prosecutor fabricated evidence. It appears he is referencing comments made by the prosecutor on page 657 of the trial transcript. The comments made on that page reference the beer can in the coozy that was found in the cab of the white bucket truck Morris was driving. As discussed previously, Trooper Gerber testified that he saw the beer can in the blue coozy in the cab of the bucket truck. (Trial Tr. 383, 398). Likewise, Trooper Bancroft testified that he found the beer can in the blue coozy in the cab of the truck and that he took a picture of it before removing the can and placing it into evidence. (Trial Tr. 549-550, 553). In fact,

state's exhibit 42 is a picture of the can. Thus, the prosecutor did not fabricate evidence.

¶{137} Morris' last argument concerns the comment made by the prosecutor requesting that the jury hold Morris responsible for his actions and the comment that Morris' action of leaving the scene was him trying to avoid responsibility. (Trial Tr. 653-671). When reviewing the state's entire closing argument, it had an underlying theme of accountability versus responsibility. The prosecutor's comments were, given the evidence he is responsible for this accident, so hold him responsible by finding him guilty. An entire reading of the closing shows that the prosecutor was not telling the jury to convict Morris because he did not take responsibility for his actions. As stated above, this was the prosecutor's theory/theme and as long as it was not misleading, prejudice did not occur. Consequently, this argument lacks merit.

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

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