[Cite as *State v. Wilson*, 2009-Ohio-7012.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 08 MA 51
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
ROBERT E. WILSON	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of Common Pleas of Mahoning County, Ohio
Case No. 92 CR 787

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

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JUDGES:

Hon. Cheryl L. Waite
Hon. Joseph J. Vukovich
Hon. Mary DeGenaro

Dated: December 21, 2009

[Cite as *State v. Wilson*, 2009-Ohio-7012.]
WAITE, J.

{¶1} In this delayed appeal, Appellant, Robert Wilson, appeals his conviction for the murder of his estranged wife, Tonya, in violation of R.C. 2903.02, a felony of the first degree, unlawful possession of a dangerous ordnance, in violation of R.C. 2923.17(A)(C), a felony of the fourth degree, and having weapons while under disability, in violation of R.C. 2923.13, a felony of the fourth degree.

{¶2} Appellant contends that there was insufficient evidence to sustain his murder and dangerous ordnance convictions or, in the alternative, that the greater weight of the evidence favored an acquittal on both counts. Appellant also claims that the trial court erred in not granting a mistrial due to alleged prosecutorial misconduct. Based on the evidence adduced at trial and the fact that no prejudice occurred as a result of the prosecutor's challenged conduct, Appellant's conviction is affirmed.

{¶3} Tonya was killed on July 21, 1992, shortly before 1:00 a.m., by a bullet that entered the back of her neck while she was sitting in her station wagon on Stansbury Drive in the Hill Housing Projects on the north side of Youngstown. (Tr., p. 107.) Five eye-witnesses provided testimony at trial to establish the events preceding Tonya's death.

{¶4} According to Tonya's housemate, Kim Kellar Magboo, she and Tonya took Tonya's children to Darlene Walker's house on Stansbury that evening, so that she and Tonya could go to a friend's house. (Tr., pp. 120-122.) When they arrived, Walker asked Tonya if she would take her to Whistle's, a local bar, while Magboo watched the children. (Tr., p. 121.)

{¶5} Approximately twenty minutes later when Tonya and Walker returned, Magboo sat with Tonya in her station wagon while Magboo smoked a cigarette. (Tr., p. 109.) She testified that the front passenger's side window was rolled down in order to let the smoke out of the car. (Tr., p. 114.)

{¶6} Shortly after Magboo got out of the car and walked over to Tonya's window, Appellant turned the corner onto Stansbury in his gray Delta 88 and rear-ended the station wagon. (Tr., p. 110.) According to his voluntary statement to the police, Appellant saw Tonya at Whistle's, and ordered her to pick up her children and go home. (7/21/92 Statement of Robert E. Wilson, pp. 1-2.) Appellant was angry with Tonya because she had promised to pick him up with his children at his mother's house that evening, but she did not fulfill her promise.

{¶7} After rear-ending the station wagon, Appellant exited the Delta 88, slapped Tonya, and told her to "go home." (Tr., pp. 109-110.) In response, she tried to hit Appellant with the station wagon. (Tr., p. 111.) Then she turned the station wagon around and rammed the front-end of the Delta 88. Appellant got back in his car and drove into the station wagon. This back and forth battle with the automobiles continued for some time.

{¶8} Apparently, Tonya's children were standing outside of Walker's apartment, because Magboo testified that she lost sight of Tonya and Appellant while she was trying to get the children into the house. (Tr., pp. 111-112.) LaCarra Peterson, Tonya's daughter, remained outside. (Tr., p. 128.)

{¶9} Tonya began to drive down the street in reverse, but Appellant gave chase and continued ramming into the front end of the station wagon. (Tr., p. 111.)

According to Magboo, Appellant was pushing Tonya's car down the street with his automobile. (Tr., p. 129.) At some point, her car "went sideways and hit another car." (Tr., p. 112.) Then, Magboo heard gunshots.

{¶10} She testified that she saw two sparks come out of the front driver's-side window of Appellant's car, but she heard three gunshots. She testified that the first two shots were close together, and the third shot occurred approximately five seconds later. (Tr., p. 115.) She further stated that the third gunshot was "further away" than the first two gunshots. Finally, she stated that she was close to Tonya's car when she heard the third gunshot. When Magboo reached the station wagon, she discovered that Tonya had been shot. (Tr., p. 113.) The rear driver's-side window of the station wagon was shattered. (Tr., p. 288.)

{¶11} When Appellant was apprehended at his home, he denied shooting at Tonya. The police searched Appellant's car, but the only weapon they recovered was an Intratec 9 millimeter semi-automatic gun. (Tr., pp. 277-278.) Testimony at trial established that the Intratec was not the murder weapon. (Tr., pp. 784, 975.) Magboo testified that Appellant "carrie[d] around" the Intratec, but she also had seen him with a laser-sighted gun. (Tr., pp. 116-118.) However, no other weapon belonging to Appellant was ever recovered by the police.

{¶12} Joseph Oliver, an off-duty security guard, testified that he saw Appellant's vehicle ram into Tonya's car, and he witnessed Tonya's attempts to hit Appellant with her car. He testified that Appellant continued to ram into Tonya's station wagon as she drove backwards down the street. (Tr., p. 156.)

{¶13} According to Oliver's direct testimony, he heard gunfire and went to the driver's-side door of his car to retrieve his handgun, a .357 Smith and Wesson, to protect himself. (Tr., p. 157.) He testified that he saw a gun flash come from Appellant's car, and then the station wagon started swerving and collided with a black Mustang which was parked by his car. Appellant's car crashed into the station wagon, which forced the station wagon into Oliver's car. (Tr., p. 158.)

{¶14} Oliver admitted that he fired two shots into the air, and shouted, "[g]et the fuck out of the way." (Tr., p. 157.) He claimed that he was yelling at Appellant and Tonya, "because [he] didn't know what was going on." He testified that Tonya appeared "dazed" when he caught sight of her immediately after firing his handgun. (Tr., pp. 157-158, 169.) While Appellant fled the scene Oliver called the police. (Tr., p. 159.) Oliver then left the area because he feared that Appellant would return. (Tr., p. 223.)

{¶15} On cross-examination, Oliver conceded that it was not the sound of gunfire that prompted him to retrieve his handgun. (Tr., p. 208.) He admitted that he grabbed the gun because he was afraid that Tonya was going to crash into his car. Oliver testified that he did not see a laser sight emitting from Appellant's car that night. (Tr., p. 218.) He conceded that he did not include the fact that he saw a gun flash or a gun in his statement to the police immediately following the incident. (Tr., p. 253.)

{¶16} Derrick Davis was also a witness to the events of July 21, 1992. He was talking with Oliver on the sidewalk when they saw Appellant's car turn onto Stansbury. (Tr., pp. 568-570.) However, Davis did not remember the specific events

that ultimately led to Tonya's death. The state first attempted to refresh Davis' recollection by instructing him to read the statement he gave to the police on July 21, 1992. When the statement failed to refresh Davis' recollection, the trial court permitted the state to read his statement into the record, pursuant to Evid. R. 803(5), the recorded recollection exception to the hearsay rule. (Tr., p. 579.)

{¶17} According to Davis' statement to the police, while Tonya's station wagon was backing up and swerving back and forth, Davis heard a gunshot. (Tr., p. 587.) The gray Delta 88 hit the station wagon hard, and the station wagon spun backwards into the black Mustang then into Appellant's car. In his statement, Davis said:

{¶18} "I took off, and I observed [Oliver] fire two rounds into the air. I got to the top of the hill, and the guy in the Delta backed up Stansbury. I ran back down to the girl's station wagon. I saw her drop her head, and I knew she was hurt. I then went and called the ambulance." (Tr., p. 587.)

{¶19} After making his statement on July 21, 1992, he was asked if he had anything to add. He responded, "I saw the girl was looking over her shoulder while she was backing down the street. I never saw the man in the Delta's (gray) face." (Tr., p. 587.)

{¶20} After reading Davis' statement into the record, the prosecutor asked Davis whether he could identify the type of handgun that was used by the man in the gray Delta 88. Appellant's counsel objected to the question, because Davis' statement did not establish that he saw a handgun that evening. The trial court

overruled the objection, and Davis testified that he did not see a weapon, and also that he could not remember if he saw a weapon. (Tr., p. 588.)

{¶21} Davis' confusion prompted the prosecutor to produce another written statement signed by Davis and dated September 18, 1992. Appellant's counsel objected to the state's use of the statement to refresh Davis' recollection because the state had not provided a copy of the statement to the defense during discovery. (Tr., p. 590.) Appellant's counsel argued that he was not aware of the statement until just prior to Davis taking the stand, and he objected to the prosecutor's attempt to use the statement to rehabilitate the witness.

{¶22} According to the prosecutor, he wrote the statement himself during a witness interview and asked Davis to sign it. (Tr., p. 591.) He argued that the statement constituted his own work product and that he had no duty to produce the statement prior to trial. The trial court refused to let the prosecutor use the statement to refresh Davis' memory. (Tr., p. 595.)

{¶23} In the alternative, the prosecutor asked that the trial court declare Davis to be a hostile witness. (Tr., p. 602.) The trial court granted the request, over the objection of Appellant's counsel. The prosecutor asked Davis if he had given a statement that was a true statement both to himself and Detective David McKnight approximately thirteen months before the trial. Appellant's counsel objected to the question, and the trial court admonished the prosecutor for violating the trial court's earlier ruling. (Tr., pp. 602-603.) The prosecutor responded, "[o]kay. I'll just cross examine on the incident." (Tr., p. 603.)

{¶24} The prosecutor asked Davis if the man in the gray Delta 88 had a gun in his hand outside of the driver's-side window. Davis responded, "[y]eah." Although Davis stated that the gun was pointed in the direction of Tonya's neck, and that she was turned to her left while she was backing down the street in his September 18, 1992 statement, he could not recall these facts at trial. (Tr., p. 604.) Davis testified that Oliver was pointing his gun up in the air when he fired it, and that he did not fire into Tonya's car. Davis further testified that before he ran off, he heard one gunshot come from the gray Delta 88.

{¶25} Finally, when he was asked if he saw the person in the gray car with, "what [he] called a chrome gun," he answered "[y]es." (Tr., p. 605.) In his September 18, 1992 statement, Davis claimed to have seen the man in the Delta 88 with a chrome gun. The prosecutor then asked if a chrome gun is different than a Tec-9, which is a black gun, and Davis answered, "[r]ight." (Tr., p. 605.)

{¶26} On cross-examination, Davis conceded that he did not mention that he saw a gun in his July 21, 1992 statement. (Tr., p. 607.) He conceded that he did not know the origin of the gunshot, nor could he identify what the sound was when he heard it. (Tr., p. 609.) However, he did not waiver with respect to having seen something chrome outside of the driver's-side window of the gray Delta 88. (Tr., pp. 613-614.)

{¶27} After Davis left the stand, Appellant's counsel moved for a mistrial because a copy of Davis' September 18, 1992, statement and a drawing of the crime scene made by Davis were on the stand during his testimony. It is not clear when the prosecutor put these documents on the witness stand. When the trial court inquired

as to whether Davis relied upon the statement when giving testimony, the prosecutor replied, "[n]o, Your Honor." (Tr., p. 621.) Appellant's counsel stated, "[a]t the time that the witness was testifying, he had a copy of that statement and the map in front of him." The trial court responded, "[o]kay. But, at any rate, the record is what the record is. Your motion is overruled." (Tr., p. 622.)

{¶28} The fourth eyewitness, LaCarra Peterson, who was seven years old when she testified at trial, provided a markedly different account of her mother's death. Peterson was standing on Walker's porch at the time of the incident. (Tr., p. 83.) She testified that Appellant bumped into her mother's car, and that her mother "went back and ran into his car." (Tr., p. 67.) According to Peterson, Tonya got out of her car and walked up to Appellant's car. (Tr., p. 68.) Appellant bumped Tonya's car a second time, and then Tonya bumped Appellant's car. (Tr., p. 69.)

{¶29} Peterson testified that Appellant got out of his car and, "[t]hey all went back to [her] mother's car." (Tr., p. 69.) At some point, after the cars had traveled down the street, Peterson testified that Appellant walked behind Tonya's car with a gun. (Tr., pp. 71-72.) She described the gun as being black with a "red dot on it." (Tr., p. 73.) At first, she testified that she had never seen the gun prior to that evening, but later she stated that she remembered Appellant putting the gun to the head of one of her mother's friends, as well as pointing it at her mother and Magboo. (Tr., p. 75.) Finally, she testified that Appellant walked around the back of her mother's car, shot at her mother and missed, and then shot her in the neck. (Tr., pp. 77, 89.)

{¶30} She conceded on cross-examination that it was dark that evening and that Appellant and Tonya were farther away than the back of the courtroom when the shooting occurred. (Tr., p. 86.) She also stated that her mother's car had crashed into a brown car, but that there were no people around the brown car. (Tr., p. 88.) According to Peterson, Appellant shot her mother from behind the car. (Tr., p. 92.)

{¶31} On redirect, Peterson testified that Appellant shot her mother "from the trunk." (Tr., p. 94.) She heard two shots. (Tr., p. 96.) On re-cross, Peterson conceded that she claimed to see a gun in Appellant's hand when he first arrived at Walker's house in her statement to police (which was taken a year after Tonya's death), but that she testified at trial that the first time she saw the gun was after Appellant and Tonya traveled down the street. (Tr., p. 100.) She was not, at that point, certain which statement was correct.

{¶32} Peterson's testimony regarding the origin of the gunshots was corroborated by Donnie Barnette, the owner of the black Mustang. Barnette was sleeping at her mother's home in a first floor bedroom on the opposite side of Stansbury when she was roused by a loud crash. (Tr., pp. 259, 261.) When she looked out the window she "saw a gunshot so [she] got out the window." (Tr., p. 260.) She testified that the gunshots were coming from behind her Mustang. She further testified that when she saw "a light coming from the gun," she moved away from the window. (Tr., p. 261.) She heard three or four gunshots. The day following the shooting, Barnette testified that her mother discovered two bullet holes in the building. (Tr., p. 265.)

{¶33} The lion's share of the testimony of the state's firearms examiner expert, Richard Turbok, involved the analysis of two bullet fragments: the fragment removed from Tonya's jaw and a bullet jacket, with hair attached, found on the front seat of the station wagon. (Tr., pp. 290-291.) There was some testimony at trial regarding a third bullet, which was pulled from a screen door at the crime scene, but rust around the bullet suggested that it was not fired on the night in question. (Tr., pp. 329, 795, 977.)

{¶34} Although Turbok conceded that the fragments provided for analysis, "did not show any type of good, unique working detail," he concluded that the bullet that killed Tonya was a .38 caliber jacketed bullet. (Tr., pp. 779-780, 804.) He further concluded that the weapon that fired the fatal bullet was a .38 caliber or .357 Magnum caliber, with five lands, five grooves, and a right hand twist, based upon the rifling class characteristics on the bullet jacket found next to Tonya in her car. (Tr., p. 785.) However, he could not state with a reasonable degree of scientific certainty that the bullet fragment in Tonya's jaw and the bullet jacket found in the station wagon were two parts of the same bullet. (Tr., p. 812.)

{¶35} Turbok testified that, although the weapon used to kill Tonya shared the same class characteristics as Oliver's handgun, the unique detail and the lands were different. (Tr., p. 791.) Based upon microscopic detail on the bullet jacket, Turbok testified that Oliver's gun did not kill Tonya. (Tr., p. 791.) He also relied on the fact that the remaining unfired cartridges in Oliver's gun were non-jacketed. (Tr., p. 793.) He testified that the non-jacketed rounds are semi-wadcutter bullets, often called "re-loads," and are considerably less expensive than jacketed bullets. (Tr., pp. 793-794.)

{¶36} Larry Dehus, a forensic scientist employed by Law-Science Technologies, testified for the defense somewhat differently. He stated that the bullet fragment in Tonya's jaw, which he characterized as the "core," and the bullet jacket found in the station wagon were two parts of the same bullet. (Tr., pp. 920-921.) He said that the core contained trace amounts of glass particles, and the bullet jacket contained trace amounts of red paint. (Tr., p. 922.) Although he could not account for the red paint, he theorized that the glass particles "could have" come from the shattered driver's side rear window. (Tr., p. 926.) He conceded, however, that he did not examine Tonya's car because it was not impounded, (Tr., p. 972), nor did he contact the automobile manufacturer to compare the glass particles to the type of glass used for that model year in the station wagon. (Tr., p. 973.)

{¶37} Based on a test-fired round from a .357 handgun provided by the police department, Dehus concluded that the bullet fired from the .357 shared the same class characteristics as the bullet that killed Tonya. (Tr., p. 927.) Dehus conceded, however, that class characteristics narrow a piece of evidence by group, but do not "individualize" a piece of evidence. (Tr., p. 917.) He explained that he was unable to test fire Oliver's handgun, because he was told that it had been released by the police department following the completion of its investigation. (Tr., p. 929.)

{¶38} An Atomic Absorption test was performed on Appellant on July 21, 1992, to determine if he had recently fired a gun. Dr. Freidrich Koknat explained that the test is conducted to ascertain the existence of barium and antimony on hands and clothing. (Tr., pp. 489, 493.) Both substances must be present in a particular quantity in order to conclude the existence of gunshot residue. (Tr., p. 494.)

{¶39} Koknat examined towels taken from Appellant's car, but he did not find a sufficient amount of antimony to find the presence of gunshot residue. He also examined a jacket belonging to Appellant upon which he found sufficient quantities of barium and antimony on the right sleeve to constitute gunshot residue. (Tr., p. 497.) There were also smaller amounts on the left sleeve and on the front and back of the jacket, which Koknat attributed to transfer from the jacket being removed and folded.

{¶40} Appellant's right palm, which was tested approximately one hour and twenty minutes after the shooting, also tested positive for the requisite amounts of barium and antimony. (Tr., pp. 498-499.) The quantity of antimony found on Appellant's left palm, and the back of his right hand was not sufficient to be consistent with gunshot residue. (Tr., p. 500.) Appellant told Detective David McKnight he had fired his gun five days before the incident. (Tr., p. 715.)

ASSIGNMENT OF ERROR ONE

{¶41} "The trial court erred in failing to Grant the Appellant's Motion for a Criminal Rule 29 Acquittal because the Appellee failed to present sufficient evidence to prove beyond a reasonable doubt that the Appellant committed the crimes of Murder, with the accompanying gun specification, and Unlawful Possession of a Dangerous Ordinance, [sic] with accompanying specifications. Furthermore, even if this Court finds that the trial court did not err in denying the Appellant's Crim.R. 29 Motion to Dismiss, his conviction is against the manifest weight of the evidence."

{¶42} "The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 678 N.E.2d 541, paragraph two of the syllabus.

Sufficiency is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law. Sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law. *State v. Robinson* (1955), 162 Ohio St. 486, 124 N.E.2d 148. A conviction based on legally insufficient evidence constitutes a denial of due process. *Thompkins*, at 386-387, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 102 S.Ct. 2211.

{¶43} To determine whether sufficient evidence exists to support a conviction, the reviewing court must determine "whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶44} Even though a court of review may find that a verdict is supported by sufficient evidence, it may still be found to be against the manifest weight of the evidence. *Thompkins* at 387, citing *Robinson* at 487. "Weight of the evidence concerns 'the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief.' " (Emphasis sic.) Id., quoting Black's Law Dictionary (6th Ed.1990) 1594.

{¶45} " 'The court, 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.' " *Thompkins* at 387, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

{¶46} In his brief, Appellant contends that his conviction should be overturned based on the evidence for two reasons. First, Appellant contends that Oliver, now deceased, confessed to several of his family members before his death that he believed he killed Tonya. However, Appellant correctly concedes in a footnote that evidence dehors the record is not admissible on direct appeal.

{¶47} Next, Appellant argues that the evidence shows that Oliver shot Tonya from behind based upon the entry wound and the trajectory of the bullet. Appellant contends that it was impossible for him to have shot Tonya through the open passenger's-side front window, because the bullet entered the back left side of her neck and traveled upward to rest directly under the right side of her jaw.

{¶48} Appellant's argument ignores several pieces of uncontroverted evidence. First and foremost, Turbok ruled out Oliver's handgun as the weapon that killed Tonya. At trial, Detective McKnight attributed the two bullet holes that appeared in Barnette's building following the shooting to Oliver. (Tr., p. 641.) Furthermore, although Appellant's expert testified that he found glass fragments on

the bullet jacket, testimony which was not supported by the state's expert, he provided no explanation for their presence, only speculation that they could have come from the shattered rear driver's side window.

{¶49} With the foregoing facts in mind, it is not difficult to reason how the jury could find that the fatal bullet was fired from Appellant's gun. Appellant's Delta 88 and Tonya's station wagon were essentially perpendicular when they finally came to rest. In fact, there was a dent in the passenger's-side front door where the Delta 88 crashed into the station wagon. Davis's statement to the police established that Tonya was looking over her left shoulder while she was backing down the street. Magboo testified that her car "went sideways and hit another car" before she saw gun flashes from Appellant's gun. (Tr., p. 112.) Barnette also heard the collision before the gun shots. (Tr., pp. 267, 271.) Therefore, it is possible that Tonya, having lost control of her car, was turned and looking over her left shoulder when the bullet came through the passenger's side front window. Moreover, she would have likely had her head tucked as low as possible if she was aware of the gunshots, which explains the upward trajectory of the bullet.

{¶50} Although Appellant does not raise any argument regarding the Atomic Absorption test, the test results call into question the testimony that Appellant was shooting at Tonya while their vehicles were nose to nose. The most concentrated area of barium and antimony appeared on Appellant's right palm according to the test, and it is difficult to imagine how he could be firing a handgun outside the driver's-side front window of the Delta 88 with his right hand.

{¶51} On the other hand, because the fatal shot would have had to have been fired while the cars were perpendicular, Appellant could have easily used his right hand to fire a handgun when Tonya's car was stationary. Therefore, the test results do not contravene the state's theory of the murder.

{¶52} Finally, Appellant states in the opening paragraphs of his brief that his dangerous ordnance conviction should be overturned, however, he does not address this assertion in the body of his brief. R.C. 2923.17(A) reads, in its entirety, "[n]o person shall knowingly acquire, have, carry, or use any dangerous ordnance." According to the testimony at trial, when the police arrived at Appellant's home after the shooting, Appellant admitted that the Intratec was in his car. Thus, the evidence in the record fully supports Appellant's dangerous ordnance conviction.

{¶53} Contrary to Appellant's argument, the evidence at trial was both sufficient and persuasive. Accordingly, Appellant's first assignment of error is overruled.

ASSIGNMENT OF ERROR TWO

{¶54} "The trial court erred in not granting the Appellant's request for a mistrial because the prosecutorial misconduct conducted by the Appellee prejudiced the Appellant's ability to receive a constitutionally fair trial."

{¶55} The standard of review for prosecutorial misconduct is whether the actions by the prosecution were improper, and, if so, whether they prejudiced Appellant's substantial rights. *State v. Treesh* (2001), 90 Ohio St.3d 460, 480, 739 N.E.2d 749. Prosecutorial misconduct will not provide a basis for reversal unless the

misconduct can be said to have deprived Appellant of a fair trial based on the entire record. *State v. Lott* (1990), 51 Ohio St.3d 160, 166, 555 N.E.2d 293.

{¶56} Appellant does not challenge the trial court's ruling that permitted the prosecutor to treat Davis as a hostile witness. Appellant only argues that the presence of Davis' September 18, 1992, statement on the witness stand during his testimony constituted prejudicial misconduct by the prosecutor.

{¶57} While it is true that the trial court ruled that the prosecutor could not use the statement to refresh Davis' recollection because he did not provide a copy to Appellant's counsel prior to trial, Crim.R. 16 does not require that the prosecutor produce witness' statements in response to a request for discovery.

{¶58} According to Crim. R. 16, captioned "Discovery and Inspection," witness statements need not be disclosed until the close of the witness' direct testimony at trial. The rule directs the trial court, upon motion of the defendant, to conduct an in camera inspection of a witness' written or recorded statement in order to determine whether any part of the statement contravenes his or her testimony at trial. Crim.R. 16(B)(1)(g). If the trial court determines that inconsistencies exist, the statement is provided to defense counsel for use in cross-examination.

{¶59} Insofar as the trial court appears to have erred when it did not permit the state to refresh Davis' recollection with the September 18, 1992, statement, the prosecutor's failure to remove the statement from the witness stand following the trial court's ruling did not prejudice Appellant. By rule, Davis should have been permitted to review his statement, and if it did not refresh his recollection, the state should have been permitted to read the statement into evidence. Therefore, the state's failure to

remove the statement and the drawing from the witness stand cannot be said to have prejudiced Appellant even if the record indicated that the witness relied on one or both of the documents. There is no such indication, here.

{¶60} Accordingly, Appellant's second assignment of error is overruled. The judgment of the trial court is affirmed in full.

Vukovich, P.J., concurs.

DeGenaro, J., concurs in judgment only.