[Cite as *State v. Gray*, 2010-Ohio-240.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92303

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

RAMON GRAY

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-507759

BEFORE: McMonagle, J., Gallagher, A.J., and Kilbane, J.

RELEASED: January 28, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), or a motion for consideration en banc with supporting brief, per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

CHRISTINE T. McMONAGLE, J.:

{¶ 1} Following a jury trial, defendant-appellant, Ramon Gray, was convicted of two counts of aggravated murder, each with a capital offense and firearm specification, and one count of having a weapon under a disability. The trial court sentenced him to consecutive terms of life in prison without parole on the aggravated murder convictions, consecutive to three years incarceration on the firearm specifications, and five years on the weapons disability. Ramon raises nine assignments of error on appeal, none of which have merit, and therefore we affirm.

I. Circumstances Leading to Convictions

{¶ 2} At approximately 2:30 a.m. on January 11, 2007, as Eddie Parker walked up to the B-5 Lounge and Deli in Cleveland, Ohio, he saw his younger brother, Andre Parker, and his brother's friend, Willie DeLoach, scuffling with two men in the parking lot. Eddie described the man fighting with his brother as wearing a black leather jacket and black baseball cap (later identified as Ramon) and the man fighting with DeLoach as wearing a white tee-shirt and a white skull cap with a small brim on it (later identified as Ramon's brother, Rufus Gray).

{¶ 3} Eddie saw the man fighting with his brother pull a weapon and then saw Andre run to his car. Eddie ran inside the B-5 Lounge and screamed for the owner to call 9-1-1 and then, as he watched through the

windows, saw Ramon open the rear passenger door of his brother's car, and, with one hand on top of the car, aim the gun into the car and fire two shots into the vehicle. Moments later, Eddie saw what he described as a late-model, gray Oldsmobile exit the parking lot. As the car drove by, he saw two men in the vehicle and made eye contact with Rufus, the passenger in the car. He also got a partial license plate number of 4448.

{¶ 4} Eddie then went out to the parking lot, where he found his brother slumped back in the driver's seat of his car and DeLoach lying wounded in the parking lot. Both men died almost immediately; according to the coroner, Andre Parker died from a single gunshot wound to the right side of the chest and DeLoach died from a single gunshot wound to the left abdomen. The coroner also determined that both men had been shot with the same weapon.

{¶ 5} Rufus Gray was treated in the early morning hours of January 11, 2007, at the South Pointe Hospital Emergency Room for a laceration above his right eye. Ramon and Rufus's mother, Yolanda Gray, testified that she met Ramon and Rufus at the Emergency Room and saw them leave the hospital together in Ramon's car, which she identified as a late-model Oldsmobile.

{¶ 6} Later that day, police officer Michael Lawrence received a broadcast that described a possible suspect vehicle with the partial license

plate number of 4448. Office Lawrence searched the BMV computer database with different lettered prefixes attached to the numbers 4448 and eventually determined that a gray, 1990 Oldsmobile with the license plate number EBG 4448 was registered to Ramon Gray.

{¶ 7} The Cuyahoga County Coroner's Officer subsequently identified DNA obtained from a white skull cap found at the scene as matching Rufus Gray's DNA profile. His DNA was also found on both victims. The police arrested him in September 2007, and shortly thereafter, Eddie identified Rufus from a photo array as the passenger he had seen in the gray Oldsmobile driving away from the B-5 immediately after the shooting.

{¶ 8} The police arrested Ramon in February 2008. After his arrest, Eddie identified Ramon in a physical line-up at police headquarters as the man who shot his brother. Subsequently, the police determined that three fingerprints lifted from above the rear passenger side door of the car Andre Parker was found in matched Ramon's prints.

{¶ 9} The jury found Ramon guilty of two counts of aggravated murder, each with a capital offense and firearm specification, and one count of having a weapon under a disability, as indicted, and determined that he should be sentenced to life in prison without parole.

II. Assignment of the Case to a Visiting Judge

{¶ 10} Ramon first contends that he was denied due process and equal protection of the law because the visiting judge who presided over his trial was never properly assigned to the case. A party objecting to the reassignment of a case must raise the objection at the earliest opportunity or the issue is waived. *Berger v. Berger* (1981), 3 Ohio App.3d 125, 131, 443 N.E.2d 1375, reversed on other grounds, *Brickman & Sons, Inc. v. Natl. City Bank*, 106 Ohio St.3d 30, 830 N.E.2d 1151, 2005-Ohio-3559. As Ramon never objected to the transfer at any point in the proceedings in the trial court, he has waived this issue for purposes of appeal. See, also, *State v. Sizemore*, 12th Dist. No. CA2005-03-081, 2006-Ohio-1434, ¶14; *Seaford v. Norfolk S. Ry. Co.*, 159 Ohio App.3d 374, 824 N.E.2d 94, 2004-Ohio-6849, ¶17.

{¶ 11} Furthermore, the argument has no merit as the special docket of the Cuyahoga County Common Pleas Court contains filed certificates of assignment from the Ohio Supreme Court assigning the visiting judge to preside in the common pleas court for the period April 2008 through November 2008, a period that covers all of the proceedings at issue here. See Certificate 08JA0683, filed April 22, 2008; Certicate 08JA0833, filed May 7, 2008; Certificate 08JA1047, filed June 13, 2008; Certificate 08JA1313, filed July 2, 2008; Certificate 08JA1478, filed August 1, 2008; and Certificate 08JA2167, filed October 28, 2008. See also, *Marino v. Oriana House, Inc.*, Summit App. No. 23389, 2007-Ohio-1823, ¶6.

III. Penalty Phase Jury Instructions

{¶ 12} In *State v. Brooks*, 75 Ohio St.3d 148, 661 N.E.2d 1030, 1996-Ohio-134, the Ohio Supreme Court made clear that a trial court errs in instructing a jury that it must first unanimously determine that the death penalty is inappropriate before it may consider other sentencing options. Ramon argues that he was denied his right to a fair trial because the trial court erroneously instructed the jury in the penalty phase of his trial that they must first unanimously acquit him of the death sentence before considering other non-capital options.

{¶ 13} Ramon objects to instructions given to the jury before the trial court began the penalty phase of the trial. Those instructions stated:

{¶ 14} "Because you found that aggravating circumstances are present, the law provides the following four sentencing possibilities for your consideration. But this is dependent upon your determination of the aggravating circumstances versus the mitigating factors. As I indicated to you before, and this will be repeated to you later, if — and I don't have any idea what this jury is going to do — but if the jury finds beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors, then it would be your responsibility and duty in that instance to sign a verdict form, the ramification of which is the imposition of death.

{¶ 15} "If you find that the State of Ohio failed to prove beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors, then you would go on to consider other possible sentences * * *."

{¶ 16} Ramon contends that this instruction led the jury to believe that it must first come to a unanimous decision that the State had not proved that the aggravating circumstances outweighed the mitigating factors and was an improper "acquit first" instruction.

{¶ 17} As an initial matter, we note that Ramon did not object to the jury instructions in the trial court. Accordingly, he waived all but plain error. *State v. Jalowiec*, 91 Ohio St.3d 220, 744 N.E.2d 163, 2001-Ohio-26, ¶24. Plain error is an obvious error or defect in the trial court proceeding that affects a substantial right. *State v. Long* (1978), 53 Ohio St.2d 91, 94, 372 N.E.2d 804; see, also, Crim.R. 52(B). An alleged error is plain error if the error is "obvious" and "but for the error, the outcome of the trial clearly would have been otherwise." *State v. Barnes*, 94 Ohio St.3d 21, 28, 759 N.E.2d 1240, 2002-Ohio-68; *Long*, supra. We find no plain error.

{¶ 18} First, the allegedly objectionable instruction says nothing about unanimously rejecting the death penalty before considering other sentencing options. Further, Ramon ignores the instructions given to the jury at the conclusion of the penalty phase. In determining whether prejudicial error occurred, various instructions are not to be considered in isolation from one

another. *State v. Workman* (1984), 14 Ohio App.3d 385, 393, 471 N.E.2d 853, citing *State v. Hardy* (1971), 28 Ohio St.2d 89, 92, 276 N.E.2d 247. A jury charge must be considered as a whole; if it appears from the entire charge that a correct statement of the law was given, there is no prejudicial error. Id.

{¶ 19} After four witnesses testified and Ramon gave an unsworn statement, the trial court again instructed the jury as to its responsibility, and included the following instructions:

{¶ 20} "If all twelve of you find that the State of Ohio proved beyond a reasonable doubt that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the mitigating factors in this case, then it will be your duty to decide that the sentence of death shall be imposed upon the defendant. In that circumstance, your deliberations are over and you do not go on to consider any other sentences. If, on the other hand, you find that the State of Ohio failed to prove beyond a reasonable doubt that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the mitigating factors present in this case, then in that circumstance it will be your duty to decide which of the following life sentences should be imposed.

{¶ 21} "If you unanimously conclude that the State has proven beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating

factors, then you shall sign the verdict form calling for the imposition of the death sentence. *If you cannot come to a unanimous decision as to this threshold issue,* after a good faith effort to do so, *then you may go on to consider other possible penalties*." (Emphasis added.)

{¶ 22} This was not an impermissible "acquit first" instruction. The jury was not told that they must first unanimously find that the death penalty was inappropriate before they could consider other life sentences. Rather, the trial court instructed the jury that if they were unable to unanimously find that the aggravating circumstances outweighed the mitigating circumstances, then they were to go on to consider life sentences — a very different instruction than telling them they must first unanimously acquit the defendant of the death penalty before considering other life sentences.

{¶ 23} In *State v. Taylor*, 78 Ohio St.3d 15, 676 N.E.2d 82, 1997-Ohio-243, the Ohio Supreme Court considered jury instructions very similar to those used by the trial court in this case and found no improper "acquit first" instruction. Likewise, here, as in *Taylor*, the jury was free to consider a life sentence for Ramon even if they had not unanimously rejected the death penalty. Hence, we find no plain error.

IV. Manifest Weight of the Evidence

{¶ 24} When considering a manifest weight challenge, a reviewing court reviews the entire record, weighs the evidence and all reasonable inferences therefrom, considers the credibility of the witnesses, and determines whether the jury clearly lost its way. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 678 N.E.2d 541. A reviewing court "must be mindful that the weight of the evidence and the credibility of witnesses are matters primarily for the trier of fact. A reviewing court will not reverse a verdict where the trier of fact could reasonably conclude from substantial evidence that the prosecution proved the offense beyond a reasonable doubt." *State v. Thompson*, 8th Dist. No. 90606, 2009-Ohio-615, ¶16.

{¶ 25} Ramon contends that his convictions were against the manifest weight of the evidence because they were based largely on the "faulty" eyewitness identification testimony of Eddie Parker. He argues that Eddie's identification of him in the lineup after his arrest was suspect because, as Eddie admitted on cross-examination, during the months-long investigation of the homicides, he initially gave the police the name of one Benjamin Wright as being involved in the shooting based upon information he heard on the street. He also picked Wright out of a photo array and later, when shown a photo array that included Ramon, made no identification.

{¶ 26} But the jury was in the best position to hear the evidence and weigh the credibility of the witnesses. The evidence at trial established that

Eddie, an eyewitness to the murders, picked Ramon out of a lineup. Further, Eddie's testimony that he saw Ramon standing by the rear passenger door with one hand on top of the vehicle aiming a gun at his brother was corroborated by the forensic evidence: fingerprints lifted from above the rear passenger door of the car where Andre Parker was found were an identical match with Ramon. And Eddie's statement to the police immediately after the shootings that Ramon and another passenger, later identified as Rufus Gray, left the scene in a gray Oldsmobile, with a license plate bearing the digits 4448, was confirmed by Officer Lawrence's testimony that according to BMV records, at the time of the incident, Ramon Gray was the owner of a 1990 Oldsmobile Trofeo, license plate number EBG 4448.

{¶ 27} Rufus's presence at the scene that night was confirmed by the presence of his DNA, which was found on both the white skull cap left in the parking lot and on both victims. And Rufus's mother testified that she saw him in a hospital emergency room early the same morning as he was treated for an injury above his eye. She testified further that Ramon and Rufus left the hospital together, in Ramon's car, which she identified as an Oldsmobile. Finally, according to Cleveland police detective Jeffrey Sampson, who was involved in the investigation, Wright and Rufus look remarkably alike, which would explain Eddie's earlier faulty identification.

{¶ 28} After reviewing the record, weighing the evidence, and considering the credibility of the witnesses, we do not find that Ramon's convictions are against the manifest weight of the evidence.

V. Use of the Term "Mass Murder"

{¶ 29} Under R.C. 2929.04(A)(5), the death penalty may be imposed for aggravated murder if "the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender." The specification must be proved beyond a reasonable doubt. R.C. 2929.04(A).

{¶ 30} Ramon was indicted on two counts of aggravated murder, each with the above-cited capital offense specification. The indictment labeled each specification a "mass murder specification." Prior to trial, the State moved to amend the label from "mass murder specification" to "course of conduct specification," as defined in the statute. The trial court granted the motion.

{¶ 31} The case was subsequently assigned to another judge. Defense counsel asked the new judge, prior to instructing the jury in the penalty phase of the trial, to refer to the specification as a course of conduct specification, rather than a mass murder specification. The trial judge denied the motion.

{¶ 32} Ramon argues on appeal that it was prejudicial error for the trial court to refer to the specification contained in R.C. 2929.04(A)(5) as a "mass murder" specification. He claims that the reference "only served to confuse and inflame the jury" and "there is no credible way to assume that the objectionable matter was either nonprejudicial or harmless."

{¶ 33} We agree that it would have been better for the judge to have referred to the specification as a course of conduct specification, especially in light of the fact that the indictment had been so amended by the original trial judge. Under the circumstances of this case, however, we do not find reversible error.

{¶ 34} Defense counsel failed to object to the mass murder term when the jury was so instructed in the guilt phase of the trial, and raised no objection to the term as used on the copy of the indictment and verdict forms given to the jury at that time. Further, we note that defense counsel referred to the specification as a "mass murder specification" in his opening statement.

{¶ 35} In *State v. Torres*, 8th Dist. No. 86530, 2006-Ohio-3696, the defendant was found guilty of two counts of aggravated murder, each with a capital offense specification. He argued, as Ramon does here, that the trial court should not have used the term "mass murder" in instructing the jury. This court stated:

{¶ 36} "The specification set forth in R.C. 2929.04(A)(5) has been variously referred to as a 'mass murder' specification; a 'multiple murder' specification; and a 'course of conduct' specification. While the term 'mass murder' is not found in the statute, the Committee Comment to R.C. 2929.04(A)(5) states that one of the aggravating circumstance justifying the imposition of the death penalty is 'mass murder.'

{¶ 37} "Regardless of what the R.C. 2929.04(A)(5) specification is called, the use of the term 'mass murder' under the circumstances cannot rise to the level of prejudicial error. 'Mass murder' arguably suggests the killing of more than one person, a fact that indisputably occurred in this case. We also cannot conclude the jury found [the defendant] guilty of two counts of murder solely because the trial court used the term and the indictment labeled the aggravated murder specification as 'mass murder.'" Id. at ¶39-40.

{¶ 38} We agree with the reasoning of *Torres* and find no prejudicial error in the use of the "mass murder" term in this case. Two persons were murdered, which could be considered a "mass murder" under R.C. 2929.04(A)(5). Further, in light of the overwhelming evidence of Ramon's guilt, we cannot conclude that the jury found him guilty of two counts of aggravated murder solely because of the use of the term "mass murder." See, also, *State v. Gregley* (Dec. 16, 1999), 8th Dist. No. 75032.

VI. "Course of Conduct" Specifications

{¶ 39} With respect to the course of conduct specifications, the trial court instructed the jury that "the State charges in specification Number 1, and this is also applicable to Count 2, that the defendant, Ramon Gray, committed the offense of aggravated murder while the defendant purposely killed Andre Parker and also purposely killed Willie DeLoach." The verdict forms returned by the jury relating to the course of conduct specifications stated that the jury found that Ramon "did purposely cause the death of Andre Parker and also purposely caused the death of Willie DeLoach" as charged in counts one and two of the indictment.

{¶ 40} Ramon argues that in considering the specifications that qualified him for the death penalty, the jury was not asked to make a finding required by statute, i.e., that the killings were "part of a *course of conduct* involving the purposeful killing of or attempt to kill two or more persons by the offender." R.C. 2929.04(A)(5). (Emphasis added.) He contends that without the course of conduct language, the specifications, as charged and found by the jury, were "meaningless and simply redundant" to what the jury already found in Counts 1 and 2, i.e., that he purposely killed Andre Parker and Willie DeLoach.

{¶ 41} Ramon made no objection to the jury instructions in the trial court and accordingly waived all but plain error. On the facts of this case, we do not find that the outcome of the trial would clearly have been otherwise

had the trial court included the "course of conduct" language in its instructions to the jury and on the verdict forms.

{¶ 42} To find that two offenses constitute a single course of conduct under R.C. 2929.04(A)(5), the trier of fact must find some connection, common scheme, pattern or psychological thread that ties the offenses together. *State v. Sapp*, 105 Ohio St.3d 104, 822 N.E.2d 1239, 2004-Ohio-7008, ¶52. "[T]he factual link might be one of time, location, murder weapon, or cause of death. It might involve the killing of victims who are close in age or who are related. It might involve a similar motivation on the killer's part for his crimes, a common getaway car, or perhaps a similar pattern of secondary crimes (such as rape) involving each victim." Id.

{¶ 43} Here, the evidence produced at trial showed a clear factual link between the murders of Andre Parker and Willie DeLoach. The evidence unequivocally demonstrated that they were killed at the same time, at the same location, by the same murder weapon, and as a result of a similar motivation. As the murders clearly arose from a single course of conduct involving the purposeful killing of two persons, the absence of the words "course of conduct" from the jury instructions or verdict forms does not constitute plain error in this case.

VII. Presence of Sheriff's Deputy at Trial

{¶ 44} Defense counsel requested that a sheriff's deputy not escort Ramon to the stand when he gave his unsworn statement to the jury during the penalty phase of the trial. The trial court denied the request and stated that the deputy would walk up with Ramon and stand behind him as he made his statement.

{¶ 45} Ramon contends that the presence of the deputy denied him due process and a fair trial because it portrayed to the jury that he was a person of such danger that he needed an armed deputy at his side at all times. This argument is not well-taken.

{¶ 46} The United States Supreme Court has held that "the conspicuous, or at least noticeable, deployment of security personnel in a courtroom during trial" is not inherently prejudicial. *Holbrook v. Flynn* (1986), 475 U.S. 560, 568-569, 160 S.Ct. 1340, 89 L.Ed.2d 525. The court recognized that every defendant is entitled to have guilt or innocence determined solely on the basis of the evidence at trial. Nevertheless, the court stated that "[t]his does not mean, however, that every practice tending to single out the accused from everyone else in the courtroom must be struck down." Id. at 567, 106 S.Ct. at 1345. The court recommended a case-by-case analysis to determine whether the defendant was prejudiced.

{¶ 47} We find nothing in the record demonstrating that the use of one security guard who stood near Ramon while he gave his unsworn statement

was so inherently prejudicial as to deny him his right to a fair trial. Ramon points to nothing in the record that indicates the officer's presence influenced the jury in any way and we find no basis in the record for reaching that conclusion. In the absence of any affirmative demonstration of prejudice, we cannot conclude that the trial court committed plain error. Id. at 572, 106 S.Ct. at 1347-48.

VIII. Expert Witness

{¶ 48} Ramon contends that the trial court denied him due process and equal protection of the law when it denied his request for appointment of an expert on eyewitness identification. He contends that Eddie Parker's eyewitness identification was "central" to this case and, hence, an eyewitness-identification expert was necessary to explain to the jury the influences upon persons making eyewitness identifications, especially during stressful events such as a shooting.

{¶ 49} "[D]ue process and fundamental fairness require the state to provide an indigent criminal defendant with 'access to the raw material integral to the building of an effective defense.'" *State v. Brady*, 119 Ohio St.3d 375, 894 N.E.2d 680, 2008-Ohio-4493, ¶21, quoting *Ake v. Oklahoma* (1985), 470 U.S. 68, 77, 105 S.Ct. 1087, 84 L.Ed.2d 53. The decision to grant or deny a defendant's request for an expert witness lies in the trial court's discretion. *State v. Mason* (1998), 82 Ohio St.3d 144, 150, 694 N.E.2d 932.

An indigent defendant must be provided funds to obtain expert assistance at state expense only where the trial court finds that the defendant has demonstrated (1) a reasonable probability that the requested expert would aid in his defense; and (2) that denial of the requested expert assistance would result in an unfair trial. Id. at 150. In the absence of a particularized showing of need, due process does not require the provision of an expert witness. *Brady*, supra at ¶22.

{¶ 50} Ramon has not made such a showing here, because there was overwhelming physical and other evidence that corroborated Eddie Parker's eyewitness identification. Officer Lawrence testified that he matched the license plate number reported by Eddie Parker to a gray Oldsmobile registered to Ramon. Jill Ryan, a latent print examiner at the Cleveland Police Department, testified that the three fingerprints lifted from above the rear passenger door of the car where the body of Andre Parker was found were an identical match of Ramon's fingerprints. Lisa Slovek, a forensic scientist in the Cuyahoga County Coroner's Office, testified that DNA found on both victims and on the white knit hat left at the scene matched the DNA of Rufus Gray, Ramon's brother, thereby corroborating Eddie Parker's testimony that he saw Rufus in the passenger seat of the gray Oldsmobile as it left the scene immediately after the shootings. Ramon's mother, Yolanda Gray, testified that she saw Ramon and Rufus together at South Pointe

Hospital immediately after the shooting, where Rufus received treatment for an injury above his eye. She reported that Rufus and Ramon left the hospital together in Ramon's gray Oldsmobile.

{¶ 51} This evidence unequivocally tied Ramon to the crime and substantially corroborated Eddie's eyewitness identification. In the cases relied on by Ramon, *State v. Bradley*, 181 Ohio App.3d 40, 907 N.E.2d 1205, 2009-Ohio-460, and *State v. Sargent*, 169 Ohio App.3d 679, 864 N.E.2d 155, 2006-Ohio-6823, this court and the First Appellate District, respectively, held that the trial courts abused their discretion in denying the defendants' motions for the appointment of an eyewitness-identification expert because the state's cases hinged on one person's eyewitness identification of the defendants and there was no physical or other inculpatory evidence tying the defendants to the scene. Given that the accuracy of the victim's identification was the "pivotal issue" in each case, the trial courts should have granted the appointment of an eyewitness-identification expert. *Bradley*, supra at ¶16; *Sargent*, supra at ¶13.

{¶ 52} That is not the case here. The DNA, forensic, and other inculpatory evidence tying Ramon to the crime substantially corroborated the eyewitness identification. Accordingly, we cannot conclude that denial of the requested expert assistance resulted in an unfair trial. In light of the corroborating evidence, the jury was able to evaluate the veracity of Eddie's

eyewitness testimony without the assistance of an eyewitness identification expert. Accordingly, the trial court did not abuse its discretion in denying the request for expert assistance.

IX. "Other Acts" Evidence

{¶ 53} During the penalty phase of the trial, defense counsel presented Yolanda Gray to testify as to some good and worthwhile attributes of her son in hopes that the jury would spare his life. During cross-examination, the prosecutor, over defense objection, elicited testimony from her that Ramon had a pending carrying a concealed weapon charge. Ramon contends that the trial court erred in permitting this testimony as it was impermissible and inflammatory "other acts" evidence prohibited by Evid.R. 404(B).

{¶ 54} The admission of evidence rests within the sound discretion of the trial court. *State v. Kinney* (1995), 72 Ohio St.3d 491, 497, 651 N.E.2d 419. Thus we will not overturn the trial court's decision absent an abuse of that discretion. *Peters v. Ohio State Lottery Comm.* (1992), 63 Ohio St.3d 296, 299, 587 N.E.2d 290.

{¶ 55} Under Evid. R. 404(A)(1), once an accused puts evidence of his good moral character or his non-violent character in issue, the prosecution may offer evidence to rebut the accused's "good" character evidence. *State v. Ivory*, 8th Dist. No. 83170, 2004-Ohio-2968, ¶16, citing Evid.R. 404(A)(1) and *State v. Finnerty* (1989), 45 Ohio St.3d 104, 108, 543 N.E.2d 1233. Under

Evid.R. 405(A), where the character of an accused is in issue, inquiry is allowable on cross-examination into specific instances of conduct.

{¶ 56} Accordingly, we find no error in the trial court's admission of Yolanda Gray's testimony that Ramon had a pending carrying a concealed weapon charged. When Ms. Gray testified to Ramon's good character and attributes during her direct examination, she opened the door to the State's inquiry into any specific acts of conduct of the accused to rebut her earlier testimony. This evidence and method of cross-examination is permitted by Evid.R. 404(A)(1) and 405(A) and the trial court did not abuse its discretion in allowing it.

X. Ineffective Assistance of Counsel

{¶ 57} Lastly, Ramon argues that he was denied his constitutional right to effective assistance of counsel because his lawyer did not object to (1) the jury instructions and verdict forms that did not include the "course of conduct" language in the capital specification; (2) the improper "acquit first" jury instruction; and (3) the assignment of the case to a visiting judge.

{¶ 58} To establish ineffective assistance of counsel, a defendant must demonstrate that counsel's performance fell below an objective standard of reasonable representation and that he was prejudiced by that performance. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph two of the syllabus, certiorari denied (1990), 497 U.S. 1011, 119 S.Ct. 3258, 111

L.Ed.2d 768; *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674.

{¶ 59} Ramon has not demonstrated that he was prejudiced by counsel's performance. As discussed above, we found no error in the omission of the "course of conduct" language from the jury instructions and verdict forms, and the instructions did not include an improper "acquit first" instruction. Further, Ramon points to nothing in the record demonstrating that he was prejudiced by assignment of the case to a visiting judge. Accordingly, we find no ineffective assistance of counsel.

{¶ 60} Appellant's assignments of error are overruled; the judgment is affirmed. It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

CHRISTINE T. McMONAGLE, JUDGE

SEAN C. GALLAGHER, A.J., and
MARY EILEEN KILBANE, J., CONCUR