[Cite as *State v. Irizarry*, 2010-Ohio-5117.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 93353 and 93354

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ISMAEL IRIZARRY

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED
AND REMANDED IN PART

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-509516 and CR-508740

BEFORE: Celebrezze, J., Boyle, P.J., and Cooney, J.

RELEASED AND JOURNALIZED: October 21, 2010

ATTORNEY FOR APPELLANT

Thomas A. Rein
940 Leader Building
526 Superior Avenue
Cleveland, Ohio 44114

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor
BY: Brent C. Kirvel
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Appellant, Ismael Irizarry, appeals from the judgment in two criminal cases where he was convicted of aggravated murder with firearm specifications, tampering with evidence, obstruction of official business, burglary, theft, and grand theft. Appellant claims his convictions are unsupported by sufficient evidence, are against the manifest weight of the evidence, that the state engaged in misconduct at trial, that inadmissible evidence was allowed before the jury, that his statements to the police should have been suppressed, and that his right to confront and cross-examine

witnesses was violated. After a thorough review of the record and applying the pertinent law, we affirm in part and reverse and remand in part.

{¶ 2} Two 16-year-olds were involved in a home burglary where one left fingerprints behind. Police arrested and interrogated Gabriel Feliciano ("Gordo") after matching his fingerprints to those found at the home. Gordo indicated that appellant also participated in the burglary. On September 5, 2007, as part of pretrial discovery, the state played an audiotape of Gordo's confession to appellant's attorney, in which he implicated appellant. Gordo, who had been close friends with appellant, began to avoid his calls and instructed his family to tell appellant he was not home if appellant stopped by.

{¶ 3} On Sunday, September 23, 2007, Gordo was seen walking down the street with appellant. That was the last time anyone recalled seeing Gordo alive.

{¶ 4} After Gordo had been missing for some time, his family organized a rally to energize community support to search for him. At the rally, Jesus Rios, who lived next door to Anderson Diaz Fontanes, a friend of appellant's, approached Gordo's sisters and informed them that he knew where Gordo's body was. Rios talked to the police, who were led to an area of Brookside Park near where I-71 crosses the railroad tracks. The police discovered Gordo's body approximately 62 feet inside a drainage culvert next to the

railroad tracks. Gordo had been shot twice — once in the back and once in the head.

{¶ 5} Forensic entomologist, Dr. Joseph Keiper, placed the time of death between September 22, 2007 and September 25, 2007 based on the growth rate of blue bottle fly larva collected from the body. Dr. Keiper testified that the body was moved into the culvert within a few hours of death based on the lack of other species of insects found on the body.

{¶ 6} Rios also testified that he had seen appellant at Fontanes's house, that appellant was wearing bloody clothes, and that appellant stated that he had killed someone. According to Rios, appellant placed the clothes in a bag behind Fontanes's house and returned the next day to burn the clothes. Rios testified that the siding of the garage melted where appellant had burned the clothes. The state introduced photographs of the melted siding.

{¶ 7} Appellant was arrested on October 3, 2007 and taken to the second district station of the Cleveland police department for questioning. Appellant told Det. Virgil Williams that he had witnessed Gordo's abduction from a party on Saturday, September 22, 2007 by individuals named House and Kevin, and that a few days later House had made appellant move the body into a tunnel. Homicide detectives moved appellant from the second district police station to the downtown homicide division for further questioning. Detectives Joselito Sandoval, Beverly Fraticelli, and Timothy

Entenok began to interview appellant for a few minutes, but he then invoked his right to counsel. The interview terminated, and the officers left the room.

{¶ 8} Edgardo Alvarez, appellant's stepfather, approached Det. Fraticelli and spoke with her about appellant. She informed him of appellant's request to speak to counsel. Alvarez asked to speak with appellant and told appellant to make a statement to the police so they could get out of there, and if he did not, he would sign him over to the custody of the police. Appellant then asked to speak with detectives where he signed a waiver of his *Miranda* rights. Appellant then gave a videotaped statement.

{¶ 9} In CR-508740 (the "murder case"), appellant was tried before a jury on charges of aggravated murder, retaliation, tampering with evidence, and obstruction of official business. The latter two charges were severed from the original burglary case, CR-509516 (the "burglary case"). Prior to trial, the retaliation charge was dismissed because of a defective indictment.[1] Trial commenced on September 22, 2008 in the murder case, concluding in a finding of guilt for aggravated murder, tampering, and obstruction.

{¶ 10} In the burglary case, a bench trial commenced on October 22, 2008 on two counts of burglary, one count of theft, and two counts of grand theft of a motor vehicle. One count of grand theft was eliminated by the trial

[1]This charge was improperly titled "retaliation," when it was actually a charge for intimidation.

court pursuant to appellant's Crim.R. 29 motion. Appellant was found guilty of the remaining counts.

{¶ 11} Appellant was sentenced to a total of 51 years to life — 33 years to life in the murder case; eight years in the burglary case; and ten years in CR-519881, an unrelated homicide case; all to be served consecutively. Appellant then filed notices of appeal in all three cases, with this court consolidating the appeals involving the murder and burglary cases into the present appeal.

Law and Analysis

Right of Confrontation and Cross-examination

{¶ 12} For ease of discussion, appellant's sixth assignment of error will be addressed first. Appellant claims that his right to confront and cross-examine witnesses against him was violated with the admission of hearsay involving statements Gordo made implicating appellant in a burglary.

{¶ 13} Appellant claims that Gordo's recorded statement and related testimony were hearsay. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). In the murder case, evidence relating to Gordo's statements to the police was not offered to prove the truth of the matter asserted, but to show that appellant

had a motive to harm Gordo and to explain appellant's actions. See *State v. Maurer* (1984), 15 Ohio St.3d 239, 262, 473 N.E.2d 768. Therefore, the recorded statement and associated testimony were not hearsay as defined in Evid.R. 801(C).

{¶ 14} The Sixth Amendment of the U.S. Constitution provides a defendant the right to be confronted with the witnesses against him. *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177. This right is not absolute. It can be forfeited by one who intentionally interferes with the ability of the state to provide such confrontation. "Under Evid.R. 804(B)(6), a statement offered against a party is not excluded by the hearsay rule 'if the unavailability of the witness is due to the wrongdoing of the party for the purpose of preventing the witness from attending or testifying.' * * * To be admissible under Evid.R. 804(B)(6), the 'offering party must show (1) that the party engaged in wrongdoing that resulted in the witness's unavailability, and (2) that one purpose was to cause the witness to be unavailable at trial.' Id.; see, also, *United States v. Houlihan* (C.A.1, 1996), 92 F.3d 1271, 1280." *State v. Hand*, 107 Ohio St.3d 378, 2006-Ohio-18, 840 N.E.2d 151, ¶84.

{¶ 15} Even if the statements were hearsay in the murder case, the state presented evidence that appellant killed Gordo to prevent him from testifying. This satisfies both prongs of the test set forth in *Hand*.

Therefore, appellant's right to confront his accuser was forfeited by his own actions.

{¶ 16} In the burglary case, the recorded statement of Gordo implicating appellant was heard by the trial judge. The same trial judge presided over both the murder case and the burglary case. The court took notice of the evidence and guilty verdict offered in the murder case to satisfy the elements set forth in *Hand*; however, this was done in error.

{¶ 17} Evid.R. 201(B) states, '[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

{¶ 18} "'[A trial] court may not take judicial notice of prior proceedings in the court, but may only take judicial notice of the proceedings in the immediate case.'" *State v. Baiduc*, Geauga App. No. 2006-G-2711, 2007-Ohio-4963, ¶20. See, also, *Charles v. Conrad*, Franklin App. No. 05AP-410, 2005-Ohio-6106, ¶26. This rule was supported in *State v. Brewer*, 121 Ohio St.3d 202, 2009-Ohio-593, 903 N.E.2d 284, where the Ohio Supreme Court stated: "While acknowledging that Evid.R. 201 permits a court to take judicial notice of adjudicative facts sua sponte, the appellate court observed that 'the overwhelming majority of courts in Ohio have held that "* * * a court

may not take judicial notice of prior proceedings in the court, but may only take judicial notice of prior proceedings in the immediate case."'" Id. at ¶22, fn. 3, quoting *State v. Lovejoy* (Feb. 8, 1996), Franklin App. No. 95APA07-849, at 9, quoting *Diversified Mtg. Investors, Inc. v. Bd. of Revision* (1982), 7 Ohio App.3d 157, 159, 454 N.E.2d 1330.

{¶ 19} It was therefore inappropriate for the trial court to refer to evidence presented in the murder case as the basis for its ruling to allow the admission of Gordo's recorded statement implicating appellant in the burglary case.

Insufficient Evidence

{¶ 20} In appellant's first assignment of error, he complains that "[t]he trial court erred in denying appellant's motion for acquittal when the state failed to present sufficient evidence to sustain a conviction."

{¶ 21} Under Crim.R. 29, a trial court "shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt." *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 381 N.E.2d 184, syllabus. "A motion for judgment of acquittal under Crim.R. 29(A) should be granted only where reasonable minds could not fail to find reasonable doubt." *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 23, 514 N.E.2d 394.

{¶ 22} Thus, the test an appellate court must apply in reviewing a challenge based on a denial of a motion for acquittal is the same as a challenge based on the sufficiency of the evidence to support a conviction. See *State v. Bell* (May 26, 1994), Cuyahoga App. No. 65356. In *State v. Jenks* (1991), 61 Ohio St.3d 259, 273, 574 N.E.2d 492, the Ohio Supreme Court set forth the test an appellate court should apply when reviewing the sufficiency of the evidence in support of a conviction:

{¶ 23} "[T]he relevant inquiry on appeal is whether any reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. In other words, an appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Eley* [(1978), 56 Ohio St.2d 169]." See, also, *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct 2781, 61 L.Ed.2d 560.

{¶ 24} In the murder case, appellant claims there is no evidence that he killed Gordo. He was convicted of R.C. 2903.01(A), which states that "[n]o person shall purposely, and with prior calculation and design, cause the death of another * * *." The state presented evidence that showed appellant had a motive to kill Gordo — Gordo was going to testify against him in a burglary case pending in the juvenile court. Appellant was seen by Rios in possession

of a firearm and burning bloody clothes. Appellant admitted to Rios that he had killed someone. Appellant fabricated a story about witnessing Gordo's abduction from a party and moving his body.

{¶ 25} Lillian Rodriquez, Gordo's girlfriend, testified that she argued with Gordo on the day he went missing about his plans to go with appellant down to the railroad tracks, which was close to where Gordo's body was discovered. Gordo was last seen walking with appellant on Sunday, September 23, 2007. This date was within the time frame the forensic entomologist set for the time of death.

{¶ 26} In videotaped statements that were played for the jury, appellant admitted to moving Gordo's body. That provided sufficient evidence for the tampering with evidence charge. Appellant's statement to the police, which he admitted was false, properly serves as the basis for a finding of guilt for obstruction of official business.

{¶ 27} While no physical evidence tied appellant to the crime scene, such evidence is not required in order to sustain a conviction. *Jenks*, supra, at paragraph one of the syllabus. The state presented sufficient circumstantial evidence to show that appellant killed Gordo to prevent him from testifying against him and then hid his body in a drainage culvert near Brookside Park.

{¶ 28} In the burglary case, the state presented evidence of two separate burglary incidents. In the burglary of the home of Vincent Cabot, the state

called two witnesses, one who testified that appellant broke into Cabot's home, which was across the street from his own home, and another testified that she witnessed appellant carrying things from Cabot's home across the street to the home of the first witness.

{¶ 29} In the burglary of the apartment of Heather Goode and Heather Milligan and the thefts of their cars, the state called Goode, who testified that she did not see the intruders. Appellant was implicated in the burglary of the women's apartment and the theft of their cars by Gordo's statement. Pursuant to our holding that Gordo's recorded statement was admitted in error, this case must be remanded for a new trial on these two charges. See *Brewer*, supra, at ¶20-25, ("when evidence admitted at trial is sufficient to support a conviction, but on appeal, some of that evidence is determined to have been improperly admitted, the Double Jeopardy Clauses of the United States and Ohio Constitutions will not bar retrial.").

Manifest Weight

{¶ 30} Appellant also argues that his convictions are against the manifest weight of the evidence. Article IV, Section 3(B)(3) of the Ohio Constitution authorizes appellate courts to assess the weight of the evidence independently of the fact-finder. Thus, when a claim is assigned concerning the manifest weight of the evidence, an appellate court "has the authority and duty to weigh the evidence and to determine whether the findings of * * * the

trier of the facts were so against the weight of the evidence as to require a reversal and a remanding of the case for retrial." *State ex rel. Squire v. Cleveland* (1948), 150 Ohio St. 303, 345, 82 N.E.2d 709.

{¶ 31} The standard employed when reviewing a claim based upon the weight of the evidence is not the same standard to be used when considering a claim based upon the sufficiency of the evidence. The United States Supreme Court recognized this distinction in *Tibbs v. Florida* (1982), 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652, where the court held that unlike a reversal based upon the insufficiency of the evidence, an appellate court's disagreement with the jurors' weighing of the evidence does not require special deference accorded verdicts of acquittal, i.e., invocation of the double jeopardy clause as a bar to relitigation. Id. at 43.

{¶ 32} The evidence, as sifted through above, also demonstrates that the jury did not lose its way in convicting appellant of the aggravated murder of Gordo and the burglary of Cabot's home. Appellant had clear motive to eliminate Gordo as a witness against him. Appellant was one of the last people seen with Gordo. He was seen burning bloody clothes and admitted to Rios that he had killed someone. Appellant also shared the location of the body with Rios. Appellant lied to the police about the circumstances surrounding Gordo's disappearance and about his role in Gordo's murder. Appellant was seen breaking into Cabot's home and carrying items across the

street. While the testimony of the first witness to the Cabot burglary was suspect given that he was also implicated in the crime, the independent corroboration of the second witness provided a solid basis for a finding of guilt. Neither the jury nor the trial court lost their way, creating a manifest injustice that must be addressed by this court. Appellant's second assignment of error is overruled.

Prosecutorial Misconduct

{¶ 33} In appellant's third assignment of error, he argues that he was denied a fair trial due to prosecutorial misconduct when the assistant prosecutor commented on his failure to testify.

{¶ 34} The prosecution is normally entitled to a certain degree of latitude in its concluding remarks. *State v. Woodards* (1966), 6 Ohio St.2d 14, 26, 215 N.E.2d 568; *State v. Liberatore* (1982), 69 Ohio St.2d 583, 589, 433 N.E.2d 561. A prosecutor is at liberty to prosecute with earnestness and vigor, striking hard blows, but may not strike foul ones. *Berger v. United States* (1935), 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314. It is a prosecutor's duty in closing arguments to avoid efforts to obtain a conviction by going beyond the evidence that is before the jury. *United States v. Dorr* (C.A.5, 1981), 636 F.2d 117.

{¶ 35} The test regarding prosecutorial misconduct in closing arguments is whether the remarks were improper and, if so, whether they prejudicially

affected the substantial rights of the defendant. *Dorr* at 120. To begin with, the prosecution must avoid insinuations and assertions that are calculated to mislead the jury. *Berger* at 88.

{¶ 36} Generally, conduct of a prosecuting attorney at trial shall not be grounds for reversal unless the conduct deprives the defendant of a fair trial. *State v. Apanovich*, supra; *State v. Papp* (1979), 64 Ohio App.2d 203, 412 N.E.2d 401. An appellant is entitled to a new trial only when a prosecutor asks improper questions or makes improper remarks and those questions or remarks substantially prejudiced appellant. *State v. Smith* (1984), 14 Ohio St.3d 13, 470 N.E.2d 883. In analyzing whether an appellant was deprived of a fair trial, an appellate court must determine whether, absent the improper questions or remarks, the jury still would have found the appellant guilty. *State v. Maurer* (1984), 15 Ohio St.3d 239, 266, 473 N.E.2d 768; *State v. Dixon* (Mar. 13, 1997), Cuyahoga App. No. 68338.

{¶ 37} The touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor. *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S.Ct. 940, 947, 71 L.Ed.2d 78, 87.

{¶ 38} Appellant complains that the prosecution remarked on his failure to testify in his defense. In closing arguments, the prosecution stated: "And be mindful, the only person to this day who has ever said that there was a

party on Saturday night that the victim was abducted from is the Defendant himself. Nobody else. And just like the State of Ohio, the defense has subpoena power."

{¶ 39} Appellant characterizes this statement as casting doubt on the fairness of the trial. However, appellant objected, and the court sustained the objection. The court also issued a cautionary instruction to the prosecutor. When the state attempted to talk about a possible witness who was not called by the defense, appellant objected, and the court sustained the objection and instructed the jury to disregard the statement. The trial court properly instructed the jury. A jury is presumed to follow instructions issued by the trial court. *Bell v. Mt. Sinai Med. Ctr.* (1994), 95 Ohio App.3d 590, 599, 643 N.E.2d 151. Appellant's ability to receive a fair trial was not so compromised that the court was required to declare a mistrial, as appellant maintains.

{¶ 40} The second statement was made in an attempt to rebut comments made in appellant's closing argument that Gordo was abducted from a party the day before he was last seen. In *State v. Ferrell*, Cuyahoga App. No. 83312, 2004-Ohio-5962, this court found that a similar statement about a defendant's failure to call an alibi witness was permissible, and even if it were not, it amounted to harmless error. Id. at ¶46-49.

{¶ 41} In *State v. Broadus* (Dec. 10, 1981), Cuyahoga App. No. 43554, this court found that a comment by the prosecution that a defendant failed to call a certain witness who could verify a claimed defense did not amount to a constitutional deprivation of one's right to a fair trial. Id. at 2 ("the prosecutor did not comment on the appellant's failure to testify; rather the prosecutor remarked on the appellant's failure to subpoena witnesses to support his case. This is permissible.").

{¶ 42} Appellant's counsel objected to the complained of comments, and the trial judge limited any harm with proper instructions to the jury. This assignment of error is overruled.

Other Acts Evidence

{¶ 43} In his fourth assignment of error, appellant claims that the trial court erred when it admitted other acts testimony in violation of R.C. 2945.59, Evid.R. 404(B), and appellant's rights under Article I, Section 10 of the Ohio Constitution and the Fourteenth Amendment to the United States Constitution.

{¶ 44} With regard to the admissibility of "other acts" evidence, it is well established that evidence tending to prove that the accused has committed other acts independent of the crime for which he is on trial is inadmissible to show that the defendant acted in conformity with his bad character. *State v.*

Gumm, 73 Ohio St.3d 413, 426, 1995-Ohio-24, 653 N.E.2d 253. However, R.C. 2945.59 states:

{¶ 45} "In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant." See, also, Evid.R. 404(B).

{¶ 46} Appellant points to three instances of testimony where improper "other acts" were allowed in. He failed to object to the inclusion of this evidence, and has waived all but plain error. To constitute plain error, the error must be obvious on the record, palpable, and fundamental, so that it should have been apparent to the trial court without objection. See *State v. Tichon* (1995), 102 Ohio App.3d 758, 767, 658 N.E.2d 16. Moreover, plain error does not exist unless the appellant establishes that the outcome of the trial clearly would have been different but for the trial court's allegedly improper actions. *State v. Waddell*, 75 Ohio St.3d 163, 166, 1996-Ohio-100, 661 N.E.2d 1043. Notice of plain error is to be taken with utmost caution,

under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *State v. Phillips*, 74 Ohio St.3d 72, 83, 1995-Ohio-171, 656 N.E.2d 643.

{¶ 47} Appellant claims that Rios was permitted to testify that appellant had previously carried a gun or was known to carry a gun. Appellant also takes issue with testimony regarding an incident where he gave a handgun to a friend who was later arrested with it and testimony that he had written a note saying he wished to kill his stepfather.

{¶ 48} Rios testified that appellant was seen with a gun and bloody clothes. The state then asked, "[h]ad you seen [appellant] carry a firearm in the past?" Rios answered, "[o]nce or twice, yes." While this is impermissible "other acts" testimony not offered for a proper purpose under Evid.R. 404(B), it does not rise to the level of plain error.

{¶ 49} Testimony that appellant was prone to carry a gun cannot be construed as introduced for a valid purpose under Evid.R. 404(B). It does not show motive, intent, absence of mistake or accident, scheme, plan, or system. However, this brief testimony cannot be said to be outcome determinative. Appellant has not demonstrated that his carrying a gun "[o]nce or twice" would have made any difference in the trial whatsoever.

{¶ 50} Appellant also complains that both the testimony regarding an incident where he gave a handgun to a friend who was then arrested with it

and the testimony regarding a note he had written saying he wished to kill his stepfather were improperly allowed.

{¶ 51} In regard to the note appellant wrote, this testimony does not allege that appellant did anything wrong and does not rise to the level of "other acts" evidence. See *State v. Ford*, Cuyahoga App. No. 88236, 2007-Ohio-2645, ¶29-31.

{¶ 52} Testimony regarding the gun appellant gave to a friend can be properly classified as "other acts" evidence and was not introduced for one of the enumerated purposes. The gun was unrelated to the present case, and the state did not attempt to show that the friend had any involvement in Gordo's disappearance. However, this testimony does not give rise to plain error because appellant has failed to show that the outcome of the trial would likely have changed without this brief testimony. Therefore, appellant's fourth assignment of error is overruled.

Motion to Suppress

{¶ 53} Appellant argues in his fifth assignment of error that "[t]he trial court erred by denying the motion to suppress statements after Appellant invoked his right to counsel but the police continued interrogating him."

{¶ 54} "In a motion to suppress, the trial court assumes the role of trier of fact and is in the best position to resolve questions of fact and evaluate witness credibility. A reviewing court is bound to accept those findings of

fact if supported by competent, credible evidence. However, without deference to the trial court's conclusion, it must be determined independently whether, as a matter of law, the facts meet the appropriate legal standard." (Internal citations omitted.) *State v. Curry* (1994), 95 Ohio App.3d 93, 96, 641 N.E.2d 1172.

{¶ 55} Appellant argues that he was not properly advised of his *Miranda* rights, and therefore his statements made to the police should have been suppressed. "In *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, the Supreme Court held that the prosecution has the burden of proving the following facts in order for a statement made by an accused at the time of custodial interrogation to be admitted in evidence: (1) the accused, prior to any interrogation, was given the Miranda warnings; (2) at the receipt of the warnings, or thereafter, the accused made 'an express statement' that he desired to waive his Miranda constitutional rights; (3) the accused effected a voluntary, knowing, and intelligent waiver of those rights." *State v. Edwards* (1976), 49 Ohio St.2d 31, 38, 358 N.E.2d 1051.

{¶ 56} In the present case, appellant was first advised of his rights in both English and Spanish when he was taken into custody at his high school. Det. Williams read appellant his rights a second time before he began questioning him. Appellant's mother and stepfather signed a statement acknowledging that appellant was read his rights. After being transferred to

the homicide unit at the Justice Center, appellant was advised to read his rights, which were posted on the wall of the interrogation room in large font. Appellant executed a waiver of those rights. After approximately ten minutes, appellant said he wished to speak with an attorney and questioning ceased.

{¶ 57} Det. Fraticelli informed appellant's stepfather that appellant had terminated the interview. Appellant then spoke with his stepfather, Alvarez. This conversation allegedly consisted of Alvarez threatening appellant to make a statement, any statement, or he would sign appellant over to the custody of the police. Appellant then asked to speak to detectives and gave them a statement after executing a third *Miranda* waiver.

{¶ 58} In *Edwards v. Arizona* (1981), 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378, the Supreme Court held "[w]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to police-initiated interrogation after being again advised of his rights. An accused, such as petitioner, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation until counsel has been made available to him, *unless the accused has himself initiated further communication*, exchanges, or conversations with the police." (Emphasis added.) Id. at the syllabus.

{¶ 59} Here, appellant initiated contact with the police following the invocation of his right to counsel. The intervention of Alvarez cannot be attributed to the police because his conversation with appellant occurred without police urging or instigation. Therefore, the trial court did not err in denying appellant's motion to suppress. Appellant was advised of his rights at least four times, evidenced by three signed documents and the testimony of various police officers. Appellant's fifth assignment of error is overruled.

Conclusion

{¶ 60} Appellant's conviction for the killing of Gabriel Feliciano in order to silence him was supported by sufficient evidence and was not against the manifest weight of the evidence. None of appellant's claimed errors at the murder trial necessitate this court's interference with the verdicts in that case. However, the trial court inappropriately referenced evidence produced in the murder trial for an evidentiary ruling in the burglary case to allow in the audio statement of Gordo implicating appellant in a burglary of the apartment of Heather Goode and Heather Milligan and the theft of Goode's car. This error requires a new trial on these charges.

{¶ 61} This cause is affirmed in part, reversed in part, and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant and appellee share the 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.

FRANK D. CELEBREZZE, JR., JUDGE

MARY J. BOYLE, P.J., CONCURS;
COLLEEN CONWAY COONEY, J., CONCURS IN JUDGMENT ONLY