

[Cite as *State v. Malone*, 2015-Ohio-2150.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101305

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JAMAL MALONE

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-577833-A

BEFORE: Celebrezze, A.J., Blackmon, J., and McCormack, J.

RELEASED AND JOURNALIZED: June 4, 2015

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FRANK D. CELEBREZZE, JR., A.J.:

{¶1} Defendant-appellant, Jamal Malone (“Malone”), appeals from his convictions for aggravated murder, murder, felonious assault, discharge of a a firearm on or near a prohibited premises, and having a weapon while under disability. After careful review of the record and relevant case law, we affirm Malone’s convictions.

I. Factual and Procedural History

{¶2} On September 11, 2013, Malone and codefendant, Darnell Holloway, were charged in a six-count indictment for the death of 27-year-old Kishaun Stratford.¹ Count 1 charged them with aggravated murder in violation of R.C. 2903.01(A). Count 2 charged them with murder in violation of R.C. 2903.02(B). Count 3 charged them with felonious assault in violation of R.C. 2903.11(A)(1). Count 4 charged them with kidnapping in violation of R.C. 2905.01(A)(3). Count 5 charged them with discharge of a firearm on or near a prohibited premises in violation of R.C. 2923.162(A)(3). Counts 1 through 5 each included one- and three-year firearm specifications. Count 6 charged Holloway with having weapons while under disability in violation of R.C. 2923.13(A)(2). Count 7 charged Malone with having weapons while under disability in violation of R.C. 2923.13(A)(3).

{¶3} On February 24, 2014, the matter proceeded to a joint jury trial, where the following evidence was adduced.²

¹ See *State v. Holloway*, 8th Dist. Cuyahoga No. 101289, 2015-Ohio-1015.

² Each having a weapon while under disability charge was tried to the bench.

{¶4} In the evening hours of July 2, 2012, Stratford was shot and killed near his apartment located at 6110 Denison Avenue in Cleveland, Ohio. Through their investigation, Cleveland police learned that Malone and Holloway were involved in Stratford's death. Malone desired to kill Stratford because of an incident that occurred during the late evening hours of June 30, 2012, at a house on West 31st Street owned by Stratford's cousins, Harold Moore ("Moore") and Martez Robertson ("Robertson"). Stratford and others would record rap music in Moore's homemade studio. While sitting on the front porch of Moore and Robertson's house, waiting to use Moore's studio, Malone was robbed by two assailants. One of the assailants tried to disguise his voice, which led Malone to believe this assailant was Stratford.

{¶5} Asa Prude ("Prude"), Malone's cousin, was on his way to Moore's studio when Malone was robbed. Prude was also a longtime friend of Stratford. When he arrived at Moore's house, he observed Malone sitting on the porch with a towel covering his mouth. Malone was bleeding, and a tooth was knocked out of his mouth. At that time, Malone told Prude that he believed Stratford was one of the assailants who mugged him. Before he went to the hospital for his injuries, Malone asked Prude to call "Chill," a.k.a. David Cousin ("Cousin"), and ask him if he had seen Stratford because Malone wanted to finish working on a song together. Approximately five minutes after speaking with Prude, Cousin received a call from Malone asking if he had seen Stratford lately. Cousin testified that he thought that both calls were "odd," given that he never observed Malone and Stratford record together. Nevertheless, Cousin testified that he provided

Prude with Stratford's phone number and subsequently told Stratford that Malone and Prude were trying to contact him.

{¶6} Then, at approximately 6:30 p.m. on July 2, 2012, Stratford left the apartment he shared with his girlfriend, Amada Gamez ("Gamez"), and rode his bicycle to his cousins' house on West 31st Street. After spending approximately 30 minutes in the studio, Stratford rode his bike back to his apartment on Denison Avenue. At some point, Stratford decided to stop at the corner gas station to purchase a cigar.

{¶7} While riding to get the cigar, Stratford called Cousin at approximately 7:35 p.m. on his cell phone. While talking to Cousin, Stratford noticed a car parked on the street near Partner's Pub, a bar located across from Stratford's apartment. Cousin testified that Stratford stated, "that look like Mal. That is Mal. Let me go holler at him." Cousin explained that "Mal" is Malone's nickname. Cousin then heard wind picking up in the phone and assumed Stratford was approaching "Mal." Stratford told Cousin that he would call him back and ended their call at 7:47 p.m. Approximately seven minutes later, Cousin received a call from Gamez who informed him that Stratford had been shot.

{¶8} Surveillance video from Partner's Pub, which was played for the jury, depicts Stratford riding his bicycle up to a white Chevy Impala, later determined to be Malone's vehicle. He parked his bicycle and approached the driver, later determined to be Malone. While Stratford spoke with Malone, the video depicts a man, later identified as Holloway, run up behind Stratford and fire his gun into Stratford's back. Holloway

then jumped into the passenger side of the vehicle, and Malone drove away from the scene. After being shot, Stratford stumbled and fell onto a tree lawn on West 62nd Street.

{¶9} Richard Nesmith (“Nesmith”), a resident in the area, was in his driveway washing his car when he observed an argument between a young black man on a bicycle, later determined to be Stratford, and people inside a white car. He did not pay much attention to this argument because it was near a local bar, and it was normal to hear arguing. He first heard what he thought were fireworks and then heard a woman screaming. He ran to the end of the driveway and observed the white car, later determined to be Malone’s Chevy Impala, as it sped away and saw Stratford stumble across the street and fall against a wall. When he ran up to Stratford, Barbara Lydston (“Lydston”), Stratford’s neighbor, was already on the scene. Nesmith knows Lydston from the local neighborhood bar. Nesmith held Stratford’s head up and told him he was “going to be all right.” He testified that Stratford was in shock. He was bleeding, his eyes were glazed, and he could barely speak.

{¶10} Lydston testified that she was outside her apartment when she heard gunshots. She then ran across the street and found Stratford lying face down with bullet holes in his back and buttocks. Lydston, a home health care provider, attempted to assist Stratford by taking the T-shirt from his shorts pocket and using it to apply pressure to the gunshot wounds. Lydston testified that Stratford was losing blood and was barely breathing. He could not move his head and was mumbling. Lydston asked him, “who

did this?” Stratford responded by repeatedly saying “Mal.” After naming “Mal,” Stratford lost consciousness, and Lydston began administering CPR.

{¶11} Later that evening, Lydston was interviewed by Cleveland police detectives who were being followed by cameramen for the television show, *The First 48*. Lydston testified that the cameramen’s presence “bothered” her because she was scared for her safety and possible retaliation for publicly cooperating with the police. Due to this fear, Lydston admitted that she withheld information from the police, including Stratford’s dying declaration that “Mal” was responsible for his death.

{¶12} Months later, Lydston was reinterviewed by detectives. During this interview, Lydston provided detectives with all relevant information, including Stratford’s dying declaration and the fact that she had seen Malone in a white Chevy Impala “several times” on the day of Stratford’s murder. Significantly, Lydston testified that, at approximately 5:30 p.m. on the day of Stratford’s murder, she observed Stratford speaking with Malone as he sat inside his white Chevy Impala. Lydston stated that they were “either arguing or speaking loudly in the parking lot.”

{¶13} Gamez also arrived on the scene. Gamez was home at the time of the shooting and heard the gunshots at the same time as Nesmith and Lydston, but she initially thought it was fireworks. Gamez’s neighbor informed her that Stratford had been shot, and Gamez rushed over to find Lydston administering CPR to Stratford.

{¶14} Paramedics and Cleveland police officers arrived on the scene. The paramedics transported Stratford to MetroHealth Hospital where he was pronounced dead.

Officers on the scene learned that a white or gray, early 2000 model Chevy Impala was used in the murder. Homicide Detective Ignatius Sowa (“Sowa”), a 33-year veteran of the Cleveland Police Department, investigated the matter. He interviewed numerous witnesses, including Lydston, who mentioned someone named “Mal” as a suspect. He also interviewed Cousin, Robertson, and Moore, all who mentioned “Mal” and another man named “Aces” as suspects. Sowa later learned that “Mal” was Malone and “Aces” was Prude. Sowa also learned that a 2002 white Chevy Impala was registered to Malone.

{¶15} Sowa continued to investigate Stratford’s murder through the summer and early fall of 2012, focusing on locating Malone, Prude, and the Chevy Impala. In October 2012, Sowa discovered that the title to that Impala had been transferred to Jontay Noles (“Noles”). Sowa contacted Noles and advised her that her car was the subject of a murder investigation. After obtaining consent from Noles, police searched the car and determined that there was a defect on the driver’s side door consistent with it being hit by a bullet. The police also determined that the driver’s side interior panel had been previously removed and reattached and the plastic foam beneath the previously removed interior panel had been disrupted.

{¶16} In November 2012, Malone was arrested on unrelated charges. When arrested, police discovered five different prescription pill bottles, with all five prescriptions made out to Holloway. Holloway was later arrested on unrelated charges in January 2013.

{¶17} The next major step in the investigation took place in December 2012, when Sowa re-interviewed Robertson and showed him the surveillance video. Robertson identified the car in the video as Malone's white Chevy Impala. However, Robertson was unable to identify the shooter.

{¶18} The investigation then stagnated until May 2013, when two key developments occurred. First, police located and interviewed Prude, who agreed to cooperate in exchange for consideration from the prosecutor's office in an unrelated case. Prude was interviewed by detectives in May 2013 and again in June 2013. During these interviews, Prude was shown the surveillance videos by Detective Carl Bowers, who served as a blind administrator. While watching the videos, Prude identified Stratford as the victim, Holloway as the shooter, and Malone's Chevy Impala as the car used in the murder.

{¶19} Second, John Young ("Young") became Holloway's cellmate in Cuyahoga County Jail. After Holloway learned that he was being investigated in connection with a murder following Prude's viewing of the surveillance tape, Holloway discussed the murder with Young. Young testified that Holloway admitted that he was compensated for his role as the shooter, that there was a clear motive for the murder, and that the other individual involved in the murder was in prison.³

³ Prior to Young's testimony, that the trial court limited Young's testimony to Holloway's involvement in Stratford's murder and specifically ordered Young to make no mention of Malone during his testimony.

{¶20} In June 2013, Sowa interviewed Holloway as a suspect in Stratford's murder. During this interview, Holloway repeatedly told Sowa that he did not know Malone, despite the fact that Malone and Holloway are cousins and Holloway's prescriptions were found on Malone when he was arrested in November 2012. Following the interview with Sowa, Holloway became more concerned about being implicated in Stratford's murder and admitted to Young that he was the person who shot Stratford in exchange for \$3,500 and a pound of marijuana.

{¶21} Young was not the only person that Holloway confided to while in the Cuyahoga County Jail. Rodell Smith ("Smith") was placed in Holloway's pod in June 2013. Holloway was friends with Smith's brother. Holloway began discussing with Smith details of a murder case he was concerned about. Holloway told Smith that he was present for the murder and that a car was involved in the murder. Smith testified that he witnessed a conversation between Holloway and Malone in the recreation area of the county jail.

{¶22} In July 2013, an assistant Cuyahoga County prosecutor received letters from both Young and Smith containing details regarding Holloway's involvement in Stratford's murder. Young and Smith testified they knew to write to this prosecutor because Holloway showed them paperwork relating to a search warrant that was executed on Holloway while in jail. Young and Smith both asked for assistance in their respective cases in exchange for testifying against Holloway. The prosecutor granted their requests,

and both Young and Smith received plea agreements for lesser charges in their respective cases.

{¶23} At the conclusion of the state's case, the trial court granted Malone's and Holloway's Crim.R. 29 motions with respect to Count 4 — kidnapping, but denied the Crim.R. 29 motions as to the remaining counts. At the conclusion of trial, the jury found Malone and Holloway guilty of the remaining counts, which were Count 1 — aggravated murder, Count 2 — murder, Count 3 — felonious assault, and Count 5 — discharge of a firearm on or near a prohibited premises. Thereafter, the trial court found Malone and Holloway guilty of having weapons while under disability as designated in Counts 6 and 7.

{¶24} The matter was set for sentencing on April 10, 2014. At sentencing, the trial court merged the aggravated murder, murder, felonious assault, and discharge of firearm near prohibited premises charges. The court also merged the one-year firearm specification with the three-year firearm specifications on all counts. The state elected to proceed to sentencing on Count 1 — aggravated murder. The trial court sentenced Malone to three years on the firearm specification to be served prior to and consecutive to life in prison for aggravated murder, with parole eligibility after 30 years. The trial court also imposed a 12-month sentence for having a weapon while under disability, which was ordered to run concurrently with the life sentence.

{¶25} Malone now appeals, raising seven assignments of error for review.

II. Law and Analysis

A. Sufficiency and Manifest Weight

{¶26} In his first and second assignments of error, Malone argues his convictions are not supported by sufficient evidence and are against the manifest weight of the evidence. Because Malone’s first and second assignments of error contain related arguments, we consider them together.

{¶27} When assessing a challenge of sufficiency of the evidence, a reviewing court examines the evidence admitted at trial and determines whether such evidence, if believed, would convince the average mind of the defendant’s guilt beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. “The relevant inquiry is 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.” *Id.* A reviewing court is not to assess “whether the state’s evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction.” *State v. Thompkins*, 78 Ohio St.3d 380, 390, 678 N.E.2d 541 (1997).

{¶28} While the test for sufficiency of the evidence requires a determination whether the state has met its burden of production at trial, a manifest weight challenge questions whether the state has met its burden of persuasion. *Id.* Also unlike a challenge to the sufficiency of the evidence, a manifest weight challenge raises a factual issue.

“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.”

Id. at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶29} “[T]he weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts.” *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. When examining witness credibility, “the choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact.” *State v. Awan*, 22 Ohio St.3d 120, 123, 489 N.E.2d 277 (1986).

A factfinder is free to believe all, some, or none of the testimony of each witness appearing before it. *State v. Ellis*, 8th Dist. Cuyahoga No. 98538, 2013-Ohio-1184, ¶ 18.

{¶30} In challenging the sufficiency of the evidence, Malone does not raise arguments relating to any specific element of the offenses for which he was convicted. Instead, Malone collectively relies on the lack of physical evidence and the state’s witnesses inability to identify him as the driver of the white Chevy Impala depicted in the surveillance video. Malone contends that without physical evidence or identification testimony, the jury improperly stacked inferences upon inferences and speculated that he was involved in Stratford’s murder simply because he had a relationship with Holloway, who was identified as the shooter. We disagree.

{¶31} In our view, the state presented sufficient evidence to support Malone’s convictions. Initially, we note that “[p]roof of guilt may be made by circumstantial evidence as well as by real evidence and direct or testimonial evidence, or any combination of these three classes of evidence.” *Jenks*, 61 Ohio St.3d at 272, 574 N.E.2d

492. Thus, physical evidence is not required to sustain a criminal conviction. *State v. Lopez*, 8th Dist. Cuyahoga No. 94312, 2011-Ohio-182, ¶ 62.

{¶32} Here, the state presented ample evidence of Malone's motive to kill Stratford, the actions he undertook prior to Stratford's death, his presence at the scene of the crime, and his subsequent efforts to hide his involvement in Stratford's death by transferring the title of his Chevy Impala. Contrary to Malone's position, the state did not ask the jury to convict Malone simply because he was a friend of Holloway's.

{¶33} Specifically, the jury was presented with testimony that just days before Stratford was murdered, Malone was mugged by two assailants and believed Stratford was involved. While believing Stratford had just robbed and assaulted him, Malone immediately had Prude call Cousin in an effort to locate Stratford's whereabouts and set up a time to work on a song in the studio. Furthermore, while no witness was able to identify Malone in the surveillance video, there was substantial evidence linking Malone to the scene of the crime, including (1) Lydston's testimony that Stratford gave a dying declaration that "Mal" was responsible for the shooting, (2) Lydston's testimony that she observed Stratford and Malone talking near a white Chevy Impala in the parking lot just hours before the shooting, (3) Cousin's testimony that he informed Stratford that Malone was looking for him and that Stratford stated, "that look like Mal. That is Mal. Let me go holler at him[,]" just before surveillance video depicts Stratford riding his bike over to a white Chevy Impala, (4) testimony that Malone's nickname was "Mal," (5) testimony that Malone routinely drove a white Chevy Impala that was registered under his name, and (6)

testimony that a bullet hole was found in the driver's-side door of Malone's white Chevy Impala.⁴

{¶34} Based on the foregoing, we find that a reasonable trier of fact could find Malone guilty of all charges beyond a reasonable doubt. Accordingly, Malone's convictions were supported by sufficient evidence.

{¶35} Moreover, we are unable to conclude that this is the exceptional case in which the evidence weighs heavily against the convictions. Within his challenge to the manifest weight of the evidence, Malone argues that "perhaps the most damaging and most unbelievable" testimony in the case was Lydston's testimony about Stratford's dying declaration. Malone contends that Lydston's testimony "should be given minimal, if any, weight because she did not mention the dying declaration to the police until approximately seven months after the shooting." However, Lydston testified that she did not initially come forward with Stratford's last words because she was fearful. She explained that at the time she was being interviewed at her home, Det. Sowa was being followed by television cameramen for the show, *The First 48*. Lydston testified that she did not discuss Stratford's statements with Det. Sowa in front of the cameras because she was "scared to death" and was concerned for her and her family's safety. The jury, as the trier of fact, was in the best position to weigh the credibility of the witnesses and was free to believe Lydston's testimony concerning Stratford's dying declaration and the reasons she

⁴ The surveillance video shows that Holloway fired his gun in the direction of the driver's-side door.

waited to share this information with the police. Deferring to the jury's assessment of the credibility of the witnesses, as we must, we cannot say that the trier of fact lost its way and performed a miscarriage of justice in convicting Malone of aggravated murder, murder, felonious assault, and discharge of a firearm on or near a prohibited premises. Similarly, the trial court did not lose its way in convicting Malone for having a weapon while under disability.

{¶36} Malone's first and second assignments of error are overruled.

B. Joinder of Trial

{¶37} For the purposes of clarity, we review Malone's fourth assignment of error out of order. In his fourth assignment of error, Malone argues he was denied his right to a fair trial and due process of law because the trial court joined his trial with Holloway's trial.

{¶38} It is well established that the law and public policy generally favor the joinder of charges and defendants, which involve the same acts, transactions, or course of criminal conduct. Crim.R. 8; *State v Dunkins*, 10 Ohio App.3d 72, 460 N.E.2d 688 (9th Dist.1983). This court has stated that joinder of defendants and the avoidance of multiple trials is favored in the law because it ““conserves judicial and prosecutorial time, lessens the not inconsiderable expenses of multiple trials, diminishes inconvenience to witnesses, and minimizes the possibility of incongruous results in successive trials before difficult juries.”” *State v. Thompson*, 127 Ohio App.3d 511, 523, 713 N.E.2d 456 (8th Dist.1998), quoting *State v. Thomas*, 61 Ohio St.2d 223, 225, 400 N.E.2d 401 (1980). Relief from

such joinder is available under Crim.R. 14 upon a demonstration of prejudice by the defendant. *State v. Harris-Powers*, 8th Dist. Cuyahoga No. 87921, 2007-Ohio-389, ¶ 17, citing *State v. Owens*, 51 Ohio App.2d 132, 366 N.E.2d 1367 (9th Dist.1975).

{¶39} In reviewing the record, we are unable to find that Malone has satisfied his burden of establishing prejudice. In rejecting a similar joinder argument in Holloway’s direct appeal, this court stated:

Malone’s defense centered on inculcating Prude and Jemeal Evans (“Evans”), the individual Gamez thought was responsible for the murder. Evans is also known as “Mal” and was dating Stratford’s ex-girlfriend at the time of the murder. Malone tried to inculcate Prude by pointing out his history of driving Malone’s Chevy Impala. Malone tried to inculcate Evans by pointing out Gamez’s allegations on the night of the murder, the prior relationship between Evans’s girlfriend and Stratford, and Evans owning a car similar to the one used in Stratford’s murder. Conversely, Holloway’s defense focused on discrediting Prude, who identified Holloway in the surveillance video, and Young and Smith, Holloway’s cellmates from the county jail who testified to Holloway confessing his involvement in Stratford’s murder. At no point in trial did Holloway or Malone attempt to inculcate each other.

Holloway, 8th Dist. Cuyahoga No. 101289, 2015-Ohio-1015, at ¶ 24.

{¶40} Moreover, while Malone contends the informant testimonies of Young and Smith, standing alone, warranted separate trials, we note that the trial court went to great lengths to “pare down” the informants’ testimonies to ensure Malone was not directly referenced. As mandated by the court, the informants’ testimonies regarding their interaction and observations of Holloway while he was incarcerated were introduced solely for the purposes of proving Holloway’s involvement in Stratford’s murder. The trial court emphasized this point in a jury instruction, stating:

Now, evidence may be admitted against one defendant even though it must not be considered as evidence by another defendant. You must carefully separate such evidence and consider only as to the defendant whom it applies. A statement by one defendant made outside the presence of another defendant is admissible as to the defendant making

such statement and must not be considered for any purpose as evidence against any other defendant.

{¶41} Based on the nature of the informants' testimonies and the jury instructions provided by the trial court, Malone has failed to demonstrate any prejudice by the joint trial. Therefore, we find that the joinder was proper.

{¶42} Malone's fourth assignment of error is overruled.

C. Jury Instructions

{¶43} In his third, fifth and sixth assignments of error, Malone challenges the jury instructions given by the trial court.

{¶44} "A trial court is responsible for providing all jury instructions that are relevant and necessary for the jury to weigh the evidence and determine the facts." *State v. Jennings*, 10th Dist. Franklin No. 09AP-70, 2009-Ohio-6840, ¶ 59, citing *State v. Moody*, 10th Dist. Franklin No. 98AP-1371, 2001 Ohio App. LEXIS 1111 (Mar. 13, 2001). A trial court's decision on jury instructions is treated with deference, and an appellate court will not reverse absent an abuse of discretion. *Ament v. Reassure Am. Life Ins. Co.*, 180 Ohio App.3d 440, 2009-Ohio-36, 905 N.E.2d 1246, ¶ 37 (8th Dist.), citing *Jaworowski v. Med. Radiation Consultants*, 71 Ohio App.3d 320, 327-328, 594 N.E.2d 9 (2d Dist.1991). To show reversible error, the proponent of the instruction must show both that the trial court's refusal to give the instruction was an abuse of discretion and that he was prejudiced by the court's refusal to give the proposed instruction. *Id.* Thus, this court will not reverse unless an instruction is so prejudicial that it may induce an erroneous verdict. *Youssef v. Parr*, 69 Ohio App.3d 679, 691, 591 N.E.2d 762 (8th Dist.1990).

1. Informant Testimony

{¶45} In his third assignment of error, Malone argues the trial court erred by failing to provide the jury with a cautionary instruction that the testimony of the two jailhouse informants, Smith and Young, “should be viewed with great suspicion and weighed with great caution” based on the “huge benefits” they received from the state in exchange for their testimony. The jury instruction requested by Malone is a modified version of Ohio Jury Instruction 409.17 which governs the testimony of an accomplice, not an informant.

{¶46} We recognize that both jailhouse informants were provided with reduced sentences in exchange for their testimony against Malone. However, Malone has provided this court with no case law to support his position that the general jury instruction given in cases involving accomplice testimony should be given where an informant provides testimony. *See State v. Jackson*, 2d Dist. Greene No. 2009 CA 21, 2010-Ohio-1127, ¶ 15 (“Because the informant in this case was not charged with complicity * * *, the trial court did not err in failing to give the accomplice-witness instruction.”).

{¶47} Moreover, “merely because a witness has received benefits or promises from the prosecution, such does not mean the testimony is not worthy of belief.” *State v. Covington*, 10th Dist. Franklin No. 06AP-826, 2007-Ohio-5008, ¶ 8. Here, the jury was well aware of the informants’ criminal histories and the benefits they received in exchange for their testimony. As instructed by the trial court, the jury was free to consider the

informants' "interests and bias" when assessing their credibility. Because Malone cannot establish prejudice, and his proposed jury instruction was not a proper statement of law, we find the trial court did not err by failing to give the requested accomplice instruction.

{¶48} Malone's third assignment of error is overruled.

2. Accomplice Testimony

{¶49} In his fifth assignment of error, Malone argues that the trial court erred by failing to instruct the jury on the issue of accomplice testimony as required by R.C. 2923.03(D). The section provides, in relevant part:

If an alleged accomplice of the defendant testifies against the defendant in a case in which the defendant is charged with complicity in the commission of or an attempt to commit an offense * * * the court, when it charges the jury, shall state substantially the following:

"The testimony of an accomplice does not become inadmissible because of his complicity, moral turpitude, or self-interest, but the admitted or claimed complicity of a witness may affect his credibility and make his testimony subject to grave suspicion, and require that it be weighed with great caution.

It is for you, as jurors, in the light of all the facts presented to you from the witness stand, to evaluate such testimony and to determine its quality and worth or its lack of quality and worth."

{¶50} Malone concedes that Holloway was the only accomplice in this case. He further concedes that Holloway did not testify at trial. However, Malone contends that Holloway effectively testified at trial where Smith and Young were permitted to testify about what Holloway told them about Stratford's murder.

{¶51} Malone has failed to cite any case law to support his position that a jury instruction under R.C. 2323.03(D) is required where an informant testifies about

incriminating conversations he had with the accomplice. “Based on the clear meaning of the statute, R.C. 2923.03(D) only ‘contemplates circumstances where the alleged accomplice arranges to, and subsequently does, testify on behalf of the state against the defendant.’” (Emphasis omitted.) *State v. Feerer*, 12th Dist. Warren No. CA2008-05-064, 2008-Ohio-6766, ¶ 32, quoting *State v. Lancaster*, 9th Dist. Summit No. 14212, 1990 Ohio App. LEXIS 55, *12 (Jan. 10, 1990). Because Holloway did not testify on behalf of the state, we find R.C. 2923.03(D) to be inapplicable to this case. See *State v. Wilson*, 9th Dist. Summit No. 25652, 2011-Ohio-5638, ¶ 23.

{¶52} Additionally, Smith’s and Young’s testimonies were carefully tailored by the trial court to eliminate any direct references to Malone’s involvement in the murder. Thus, the informants’ testimonies were solely introduced to incriminate Holloway. Under these circumstances, we cannot say that the trial court abused its discretion by not giving an accomplice instruction under R.C. 2923.03(D).

{¶53} Malone’s fifth assignment of error is overruled.

3. Insufficient or Incomplete Jury Instructions

{¶54} In his sixth assignment of error Malone argues that the trial court provided insufficient or incomplete jury instructions.

{¶55} Initially, Malone argues that the trial court erred by failing to provide the jury with a curative instruction to correct the prejudicial nature of the jailhouse informants’ testimonies. As stated, the trial court instructed the jury that it could not consider evidence presented solely against Holloway as evidence of Malone’s guilt. Because the

jury was provided with sufficient instructions for appropriately weighing the informants' testimonies, Malone has failed to establish prejudice.

{¶56} Next, Malone contends that the trial court gave an incomplete instruction on the term "inference." Specifically, Malone contends the instruction was insufficient because it failed to instruct the jury that facts may only be inferred "from other facts that have been proved by the greater weight of the evidence." *See Ohio Jury Instructions*, CR Section 409.01 (Rev. Aug. 17, 2011). However, "greater weight of the evidence" is equated with preponderance of the evidence. *Travelers' Ins. Co. v. Gath*, 118 Ohio St. 257, 261, 160 N.E. 710 (1928). Thus, an instruction containing the greater weight of the evidence phrase is meant only for civil cases. *State v. Doan*, 12th Dist. Clinton No. CA97-12-014, 2000 Ohio App. LEXIS 713 (Feb. 28, 2000); *State v. Coe*, 3d Dist. Seneca No. 13-97-46, 1998 Ohio App. LEXIS 2628 (June 4, 1998). As such, the instruction is erroneously given in a criminal case. *State v. Simpson*, 1st Dist. Hamilton No. C-100789, 2011-Ohio-4578, ¶ 14. Accordingly, the trial court did not abuse its discretion by failing to include the "greater weight of the evidence" language in its inference instruction.

{¶57} Finally, Malone contends the trial court erred by failing to instruct the jury that the informants' prior convictions could be used against them when assessing their credibility. As discussed, the jury was made aware of Young's and Smith's criminal histories as well as the benefits the state was providing them in exchange for their testimony. While the court did not specifically state that their criminal records could be considered when weighing their credibility, the court did instruct the jury that it could

consider their “interest and bias if any, together with all facts and circumstances surrounding their testimony.” This instruction, in substance, encompassed all information that may detract from a witness’ credibility, including their criminal record and motives for testifying. *See State v. Penque*, 8th Dist. Cuyahoga No. 99209, 2013-Ohio-4696, ¶ 69. Accordingly, we find no abuse of discretion.

{¶58} Finding no reversible error, Malone’s sixth assignment of error is overruled.

D. Motion for Mistrial

{¶59} In his seventh assignment of error, Malone argues that the trial court erred by failing to grant a mistrial following the testimony of the two jailhouse informants.

{¶60} The decision to grant or deny a mistrial lies within the sound discretion of the trial court. *State v. Garner*, 74 Ohio St.3d 49, 656 N.E.2d 623 (1995). An appellate court will not disturb the exercise of that discretion absent a showing that the accused has suffered material prejudice. *State v. Sage*, 31 Ohio St.3d 173, 510 N.E.2d 343 (1987). A mistrial should be declared only when the ends of justice so require and “a fair trial is no longer possible.” *State v. Franklin*, 62 Ohio St.3d 118, 127, 580 N.E.2d 1 (1991).

{¶61} In this matter, Malone contends that a mistrial was warranted once Young testified that Holloway stated he had been compensated for his role in the murder. Malone argues that the only logical inference the jury could make was that Malone was the person who paid Holloway. Additionally, Malone argues that a mistrial was warranted when Smith testified that he observed Malone and Holloway engaged in a conversation while in county jail. Although the court did not allow Smith to testify to the substance of

their conversation, Malone submits that the only logical inference the jury could make was that they were discussing their involvement in Stratford's murder.

{¶62} After careful review of Smith's and Young's testimonies in their entirety, we are unable to conclude that the trial court abused its discretion by failing to order a mistrial. As discussed, the trial court went to great lengths to limit the scope and nature of the jailhouse informants' testimonies in order to avoid prejudice against Malone. Prior to the testimonies of Young and Smith, the court advised the prosecution and each informant to avoid direct references to Malone during direct examination. Furthermore, the court specifically instructed the jury that it was not permitted to consider a statement made by one defendant outside the presence of another defendant as evidence against the other defendant. In our view, the trial court's limiting instruction, together with the separate evidence of Malone's guilt, was sufficient to negate any prejudice alleged by Malone. Accordingly, a mistrial was not warranted under the circumstances of this case.

{¶63} Malone's seventh assignment of error is overruled.

{¶64} Judgment 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.

FRANK D. CELEBREZZE, JR., ADMINISTRATIVE JUDGE

PATRICIA ANN BLACKMON, J., and
TIM McCORMACK, J., CONCUR