

[Cite as *State v. McMiller*, 2016-Ohio-5844.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103962

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

GERRON L. McMILLER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-594522-A

BEFORE: Boyle, J., Stewart, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: September 15, 2016

ATTORNEY FOR APPELLANT

Michael P. Maloney
24441 Detroit Road
Suite 200
Westlake, Ohio 44145

ATTORNEYS FOR APPELLEE

Timothy J. McGinty
Cuyahoga County Prosecutor
BY: Eleina Thomas
Assistant County Prosecutor
Justice Center, 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

MARY J. BOYLE, J.:

{¶1} Defendant-appellant, Gerron McMiller, appeals his convictions. He raises two assignments of error for our review:

1. The trial court erred in denying appellant's [Crim.R. 29] motion for acquittal when there was insufficient evidence to prove the elements of the weapons offenses, Counts 10 and 11 of the indictment.
2. The trial court erred in denying appellant's motion for mistrial where the appellant's Fifth Amendment right to remain silent and request legal counsel were violated.

{¶2} Finding no merit to his appeal, we affirm.

I. Procedural History and Facts Presented at Trial

{¶3} In April 2015, McMiller was indicted on 11 counts, including three counts of attempted murder in violation of R.C. 2923.02 and 2903.02(A), six counts of felonious assault in violation of R.C. 2903.11(A)(1) and (2), having a weapon while under disability in violation of R.C. 2923.13(A)(3), and illegal possession of a firearm in liquor permit premises in violation of R.C. 2923.121(A). The attempted murder and felonious assault counts carried one- and three-year firearm specifications.

{¶4} McMiller waived his right to a jury trial on the having weapons while under disability count. The remaining counts were tried to a jury, where the following facts were presented.

A. Shooting at a Bar

{¶5} Around 1:50 a.m. on March 21, 2015, three people were shot in a bar at the corner of Hamilton Avenue and East 49th Street, in Cleveland, Ohio. The bar owner

testified that he was present at the time of the shooting, and that there were around 150 people in the bar at the time.

{¶6} The bar owner explained that the bar has a video security system, with eight cameras that view and record different areas inside and outside of the bar, including the front door that shows who comes into the bar, two cameras that record just outside the front door, different areas within the bar, and just outside the back door. The eight camera views can be viewed simultaneously or individually. On most nights, the bar owner sits at a monitor and watches the live cameras simultaneously so that he knows what is happening inside and outside of the bar at all times. After the shooting, the bar owner turned the video recordings over to police.

B. Viewing the Videos “Frame by Frame”

{¶7} Detective Aaron Reese described how he viewed the video recordings slowly, “frame by frame,” to determine who the shooter was.¹ Detective Reese first watched all of the videos at the same time to determine when the shooting happened, which was around 2:17:56 according to the video’s time stamp.² Once he determined the time of the shooting from watching when the people in the bar “reacted” and “ducked down,” he focused on camera 7 because that is where most of the people were.

¹Each “frame” is a segment of the recording that is a “still shot” of what is occurring at that moment; there are five frames per second.

²The shooting actually occurred approximately 30 minutes earlier (around 1:50 a.m.); the time on the videos was not correct. We will, however, use the time stamps that were on the videos when referring to them.

{¶8} While watching camera 7 “frame by frame,” Detective Reese saw a man with what appeared to be a gun in his hand at 2:17:58. The man was wearing a jacket and a knit hat with a white stripe near the bottom of it. Detective Reese immediately noticed the man because at that point, which was only two seconds after the shooting, the man was one of the only people still standing in the bar; everyone else had “ducked” down because of the shooting. Also at that time or very soon after, there is another person near the man with the black object who appears to be trying to get away from the man. The man then places the black object in his waistband. Soon after that, at 2:18:03, the man starts to run toward the front door.

{¶9} Detective Reese continued to forward the video “frame by frame” to follow the man with the black object through the bar. Detective Reese said he was able to follow the man based on the man’s hat and jacket.

{¶10} When the man ran toward the front door, Detective Reese switched to camera 5, because that is the camera that was near the front door. Detective Reese began watching the video recording from camera 5 “frame by frame” at 2:18:05 to see if he could see the man with the hat come into view. At 2:18:10, Detective Reese saw the man come into the bottom of the frame. Detective Reese said that it then appeared to him that the man was on the ground and people were holding him down. According to Detective Reese, no one else was wearing a similar hat at that point.

{¶11} At 2:18:17, Detective Reese explained that another man wearing a hooded sweatshirt can be seen yelling in the video. Detective Reese believed that the man with

the hooded sweatshirt was trying to help the man with the hat get away from the people who were holding him down. Detective Reese said that it then appeared that the man with the hat made it to his feet and went out the front door at 2:18:28. By 2:18:29, Detective Reese stated the man with the hat was “fully outside,” because he could see the man’s back, his jacket, and his head more clearly.

{¶12} At that point, Detective Reese switched camera angles again, to view camera 2, which was one of the cameras that recorded the area just outside the front door.

At 2:18:30, Detective Reese saw the man with the hat exit the bar. Detective Reese explained that he could tell it was the same man by the jacket and the hat with the white stripe around the base of it. Detective Reese further stated that the man with the hooded sweatshirt was also outside the bar, standing in the middle of the frame. Detective Reese testified that although there were other people who exited the front door, there was only one person who was wearing a hat at that time.

{¶13} Detective Reese explained how once outside the man with the hat briefly exited the camera frame. But at 2:18:35, the man with the hat came back into the frame. At that point, the man was standing on the sidewalk facing sideways, but his face was visible. At 2:18:37, the man with the hat turned to face the camera almost directly, before he exited the frame for a second time. The man with the hooded sweatshirt was also in both of these frames, standing on the sidewalk, with his face visible in one of them.

C. Forensic Video Analysis

{¶14} Thomas Ciula testified as an expert witness for the state. Ciula was employed by the Cleveland Police Department as a forensic video specialist. Ciula explained that Detective Reese gave him the videos from the bar and told him that there had been a shooting. Detective Reese asked Ciula to assist him to find “a person of interest” in the videos. Ciula reviewed the videos independently of Detective Reese and saw the man with what appeared to be a gun. Ciula stated that the man had an object that was a “right angled, dark shaped object that fit the visual specifications of what could be a gun into [his] belt under [his] jacket.” Ciula stated that there was no one else in the videos who could have been the shooter.

{¶15} Ciula then followed the videos, frame by frame, and determined that the “person of interest” exited the bar at 2:18:30. Ciula testified that based on his forensic video expertise, the “person of interest” with the gun is the same person who exited the bar at 2:18:30, and who was standing on the sidewalk at 2:18:35 and 2:18:37, wearing a dark jacket and dark hat with a stripe near the bottom of the hat.

D. Still photos Released to the Media

{¶16} Detective Reese released two “still photos” to the media that he obtained from camera 2. The still photos were taken from the two frames time stamped at 2:18:35 and 2:18:37. Detective Reese learned from members of the public that the man with the hat was McMiller, and the man with the hooded sweatshirt was McMiller’s cousin, Ricardo Sims. Detective Reese was also able to determine who the men were by entering their photos into LEADS.

E. The Bar Owner Identifies “G-Child”

{¶17} The bar owner told Detective Reese that the man with the hat looked like a long-time customer of the bar who he knew as “G-Child.”³ Detective Reese searched police computers for alias names of “G-Child.” “G-Child” was an alias name for McMiller. Detective Reese then showed the bar owner a photo lineup that included a photo of McMiller. The bar owner identified McMiller in the photo lineup as the person he knew as “G-Child.”

F. McMiller Identifies Himself in the Still Photos

{¶18} After police arrested McMiller, Detective Reese *Mirandized* him and then interviewed him. Detective Reese showed McMiller the two photos that he had released to the public, which were time stamped at 2:18:35 and 2:18:37. McMiller identified himself in the two photos as the man wearing the hat standing on the sidewalk outside the bar approximately 40 seconds after the shooting. McMiller told Detective Reese that he was at the bar that night with his cousin. McMiller said that they were just about to leave the bar when the shooting occurred.

G. McMiller’s Cell Phones

{¶19} Detective Dwayne Duke testified that he extracted information from McMiller’s two cell phones that were recovered. In one text, the person texting identified himself as “G-Child” when sending the text (not around the time of the

³It is not clear from the bar owner’s testimony or Detective Reese’s what photo or video the bar owner was looking at when he identified G-Child to Detective Reese before McMiller was arrested. We will use “the man with the hat” for continuity.

shooting). On March 20, 2015, at 5:40 p.m. (which was earlier in the day before the shooting, which occurred on March 21, 2015 around 1:50 a.m.), someone searched the web on McMiller's phone for "mug shot of Tyvon Townsend" (one of the victims in the case). On March 21, 2015, just after the shooting at 3:01 a.m., someone texted from McMiller's phone: "call me so [sic] as you can shit just went down call asap." And on March 21, 2015, around 5:16 p.m., someone searched the web on McMiller's phone for "triple shooting at Cleveland nightclub."

H. Jury Verdict and Sentence

{¶20} The jury found McMiller not guilty of all charges except for illegal possession of a firearm in liquor permit premises in violation of R.C. 2923.121(A). The trial court found McMiller guilty of having weapons while under disability in violation of R.C. 2923.13(A)(3).

{¶21} The trial court sentenced McMiller to 36 months on each count, and ordered them to be served concurrent to each other. It is from this judgment that McMiller appeals.

II. Sufficiency of the Evidence

{¶22} In his first assignment of error, McMiller argues that the state failed to present sufficient evidence to convict him of possessing a firearm in liquor permit premises and having a weapon while under disability beyond a reasonable doubt. McMiller does not argue that the state did not meet the elements of the offenses. Rather,

he challenges the state's evidence regarding his identity and the state's evidence establishing that the black object was a gun.

{¶23} “[S]ufficiency’ is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law.” *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997), citing *Black’s Law Dictionary* 1433 (6th Ed.1990). “In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law.” *Id.*, citing *State v. Robinson*, 162 Ohio St. 486, 124 N.E.2d 148 (1955). When an appellate court reviews a record upon a sufficiency challenge, “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.” *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶24} McMiller maintains that the state's evidence was not sufficient to establish that he was the person holding the black object because the video is too blurry to identify anyone. He further argues that the video is too blurry to even establish that the black object was in fact a gun. We disagree. While the video is blurry, we find that it was sufficient evidence such that the jury could determine beyond a reasonable doubt that it was McMiller who held the black object and that the black object was a gun.

{¶25} Detective Reese meticulously analyzed the videos from the bar for many hours. After determining the time of the shooting, he focused on camera 7, where most

of the people were, and viewed the recording “frame by frame” until he saw a lone man standing just seconds after the shooting with what appeared to be a black object in his hand. The man can clearly be seen in the video because nearly everyone else falls to the ground at the time of the shooting.

{¶26} Detective Reese then followed the man through the frames of the different cameras, by noting the exact time the man would appear in the next camera angle, and by looking for the man’s hat and jacket. When the man appeared outside, Detective Reese was able to get a better photo of him, which he released to the public. Members of the community identified McMiller as the man with the hat. But more notably, McMiller identified himself in the photos as the man with the hat and jacket standing outside of the bar.

{¶27} Further, the state’s expert witness, a forensic video specialist, testified that he also viewed the videos frame by frame, only knowing that there had been a shooting at the bar, and came to the same conclusion that Detective Reese did — that the person holding the black object just after the shooting occurred was the same person who exited the bar at 2:18:30, and was standing on the sidewalk at 2:18:35 and 2:18:37.

{¶28} McMiller further argues that “[t]he state’s endless efforts to show that the knit cap with a ring on it stood out bordered on absurdity,” because the video recordings showed many people had a hat on that night. We disagree that this evidence was absurd.

Detective Reese explained how he followed two other people in the recording of camera 7 who had appeared to be wearing the same hat as McMiller. But these two individuals

hid when the shots were fired, and were not near where the lone man was standing with the black object.

{¶29} While the evidence that the man outside the bar, who McMiller identified as himself, was the same man who was holding the black object inside the bar, was circumstantial, it was nonetheless sufficient evidence as a matter of law. Indeed, we find it to be strong circumstantial evidence — because even though the view from camera 7 is blurry, the hat with the stripe can be seen on the lone man standing with the black object. Whether this same evidence should be believed is a question regarding the manifest weight of the evidence, which McMiller does not challenge.

{¶30} We further find that the evidence was sufficient to establish that the black object was in fact a gun. Even though the video is blurry, the small, black object can be seen in the man's hand within seconds after the shooting. Additionally, it appears that another person standing near the man appears to be scared of the man and appears to be trying to get away from him (the person is leaning over, with his arm out toward the man with the black object as if the other person is trying to protect himself). And then the man placed the black object in the front waistband of his pants, and turned and ran toward the front door. This evidence was sufficient circumstantial evidence that the black object was a gun.

{¶31} After reviewing the evidence presented in this case in a light most favorable to the state, we find that it was sufficient, if believed, to establish that McMiller was the person in the bar who held the black object, and that the black object was in fact a gun.

{¶32} Accordingly, McMiller’s first assignment of error is overruled.

III. Fifth Amendment

{¶33} In his second assignment of error, McMiller argues that the trial court erred when it denied his motion for a mistrial because his Fifth Amendment rights to remain silent and request legal counsel were violated.

{¶34} The granting or denial of a motion for mistrial rests in the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *State v. Treesh*, 90 Ohio St.3d 460, 480, 739 N.E.2d 749 (2001), citing Crim.R. 33, and *State v. Sage*, 31 Ohio St.3d 173, 182, 510 N.E.2d 343 (1987). “A mistrial should not be ordered in a criminal case merely because some error or irregularity has intervened, unless the substantial rights of the accused or the prosecution are adversely affected[.]” *State v. Reynolds*, 49 Ohio App.3d 27, 550 N.E.2d 490 (2d Dist.1988), paragraph two of the syllabus. “Mistrials are necessary ‘only when the ends of justice so require and a fair trial is no longer possible.’” *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, 854 N.E.2d 1038, ¶ 131, quoting *State v. Brinkley*, 105 Ohio St.3d 231, 2005-Ohio-1507, 824 N.E.2d 959. To find that a trial court abused its discretion, “the result must be so palpably and grossly violative of fact or logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance of judgment, not the exercise of reason but instead passion or bias.” *Nakoff v. Fairview Gen. Hosp.*, 75 Ohio St.3d 254, 256, 662 N.E.2d 1 (1996).

{¶35} In this case, while Detective Reese was testifying, the state asked him whether he had the chance to interview McMiller. Detective Reese explained that he interviewed McMiller at the city jail after he *Mirandized* him. Detective Reese testified that he asked McMiller if he had been at the bar on the night of the shooting. McMiller told Detective Reese that he was there with his cousin. McMiller said that his “cousin passed out drunk,” and McMiller was just waking him up to go home when the “shots rung out.”

{¶36} Detective Reese then testified that he showed McMiller the two photos that had been released to the media — the ones of McMiller and Sims standing outside of the bar after the shooting — and asked him if the man with the hat was him. McMiller replied, “That’s me.” The state then interrupted Detective Reese at that point, stating “Hold on. And what are you — [?]” Detective Reese then testified:

And he told me, That’s me. I showed him a third picture and it was a picture of him holding a gun. And I said, Who’s this? He said, That’s not me. I started to question him about the shooting, Did you have a gun on you? He’s like, You know what, I got nothing to say to you. I need to talk to a lawyer.

{¶37} Defense counsel objected and the court sustained the objection. The court told the jury, “Jury should disregard the last response.”

{¶38} At sidebar, defense counsel moved for a mistrial. McMiller’s defense counsel argued that McMiller had “every right pursuant to the Fifth Amendment not to incriminate himself.” McMiller’s defense counsel further argued that the police officer

knew or should have known never to say in front of the jury that his client refused to speak and requested a lawyer.

{¶39} The state argued that it did not elicit the testimony. The state further asserted that the court could “cure that with an instruction.” The court agreed with the state, and instructed the jury:

Ladies and gentlemen, I instruct you again to disregard the last response that was because every defendant has the right to remain silent, everyone is presumed innocent until proven guilty in a court of law and you do have the right to retain counsel, anyone does. And that was what the detective was referring to in terms of *Miranda* rights.

So the fact that it’s been injected into the proceedings should in no way be considered by you as any evidence of guilt in the case of the defendant. It is his constitutional right to request an attorney at any time. The fact that he did so cannot be held against him.

So please go forward with that in mind and I think we can proceed from that point.

{¶40} No other comment or argument was made regarding McMiller’s refusal to answer anymore questions or request to talk to an attorney.

{¶41} The Fifth Amendment to the Constitution of the United States provides that no person “shall be compelled in any criminal case to be a witness against himself.” This Amendment is made applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Malloy v. Hogan*, 378 U.S. 1, 6, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964).

{¶42} In interpreting the Fifth Amendment, the United States Supreme Court has found that criminal suspects in the custody of the police enjoy certain rights during

interrogation. *Miranda v. Arizona*, 384 U.S. 436, 478-479, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). These rights include the right to remain silent and the right to have counsel present during the interrogation. *Id.* at 467-468. “Once an accused invokes his right to counsel, all further custodial interrogation must cease and may not be resumed in the absence of counsel unless the accused thereafter effects a valid waiver or himself renews communication with the police.” *State v. Knuckles*, 65 Ohio St.3d 494, 605 N.E.2d 54 (1992), paragraph one of the syllabus, citing *State v. Williams*, 6 Ohio St.3d 281, 452 N.E.2d 1323 (1983).

{¶43} A defendant’s decision to exercise his right to remain silent during police interrogation is generally inadmissible at trial either for the purpose of impeachment or as substantive evidence of guilt. *State v. Leach*, 102 Ohio St.3d 135, 2004-Ohio-2147, 807 N.E.2d 335, ¶ 16-18; *see also Doyle v. Ohio*, 426 U.S. 610, 616-618, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976); *Wainwright v. Greenfield*, 474 U.S. 284, 291, 106 S.Ct. 634, 88 L.Ed.2d 623 (1986). Further, evidence introduced by the state during its case in chief regarding the defendant’s exercise of his right to remain silent during interrogation violates the Due Process Clause of both the state and federal constitutions. *Leach* at ¶ 18. This rule enforces one of the underlying policies of the Fifth Amendment, which is to avoid having the jury assume that a defendant’s silence equates with guilt. *Id.* at ¶ 30, citing *Murphy v. Waterfront Comm. of N.Y. Harbor*, 378 U.S. 52, 55, 84 S.Ct. 1594, 12 L.Ed.2d 678 (1964).

{¶44} There is no question in this case that McMiller’s Fifth Amendment rights to remain silent and request legal counsel were violated when Detective Reese testified in front of the jury that McMiller refused to answer the question posed to him about the shooting and asserted his right to talk to an attorney. This is especially apparent considering the fact that McMiller had just answered two other questions, affirmatively identifying himself standing outside of the bar.

{¶45} The state appears to acknowledge (without explicitly stating) that McMiller’s Fifth Amendment rights were violated, but claims that it did not elicit the testimony. While that may be true, the state most certainly knew what Detective Reese was going to say — and if it did not know, it should have known. *State v. Whitaker*, 4th Dist. Scioto No. 07CA3168, 2008-Ohio-4149 (“the state had the responsibility to adequately instruct its witnesses not to mention that [the defendant] had invoked the Fifth Amendment”); *see also State v. Johnson*, 11th Dist. Lake No. 96-L-012, 1997 Ohio App. LEXIS 2985 (July 3, 1997) (the detective “should have been instructed beforehand not to say anything about the fact that appellant refused to give a statement. The defendant’s constitutional rights may not be ignored simply because the state neglects to prepare a crucial witness.”).

{¶46} Nonetheless, even where courts have assumed error from the introduction of a statement regarding a defendant’s exercise of the right to remain silent, the admission of such a statement will not automatically be grounds for reversal. It is clear that absent the objectionable testimony, no juror could have entertained a reasonable doubt as to the

defendant's guilt because of the relative strength of the other evidence introduced at trial, then the admission of such testimony constitutes harmless error. *State v. Thomas*, 8th Dist. Cuyahoga No. 78570, 2002-Ohio-4026, ¶ 29, citing *State v. Motley*, 21 Ohio App.3d 240, 486 N.E.2d 1259 (10th Dist.1985).

{¶47} In *Greer v. Miller*, 483 U.S. 756, 107 S.Ct. 3102, 97 L.Ed.2d 618 (1987), the United States Supreme Court held that, even assuming a defendant's Fifth Amendment rights were violated, if the damaging reference to a defendant's silence was an isolated comment subject to curative instruction, such that it is clear that the statements would not impinge upon the fundamental fairness of the trial, reversal is not warranted. The court stated:

When a defendant contends that a prosecutor's question rendered his trial fundamentally unfair, it is important as an initial matter to place the remark in context. * * * The sequence of events in this case — a single question, an immediate objection, and two curative instructions — clearly indicates that the prosecutor's improper question did not violate [the defendant's] due process rights.

Id. at 766.

{¶48} In this case, when Detective Reese made the objectionable comment, defense counsel objected. The trial court immediately told the jury to disregard the testimony. After the sidebar, the trial court rendered a more comprehensive curative instruction. There is a presumption that a jury follows all of the court's instructions, including curative instructions to disregard testimony. *Treesh*, 90 Ohio St.3d 460, 480, 739 N.E.2d 749. The presumption that curative instructions remedy a mistake, however, can be rebutted by showing that the evidence could not have been ignored and that serious

prejudice likely occurred. *United States v. Gonzales-Vazquez*, 219 F.3d 37, 48 (1st Cir.2000); *see also Greer* at fn. 8 (courts generally presume that a jury follows instructions to disregard evidence unless there is an overwhelming probability that the jury will be unable to follow the instruction and a strong likelihood that the evidence would be devastating to the defendant).

{¶49} McMiller argues that the curative instruction did not fix the damage that had been done and that this testimony amounted to prejudicial error because the only evidence the state had against him “depended on this one moment of a fuzzy nearly impossible to follow video.” We disagree. As we explained in the previous assignment of error, although the recording from camera 7 showing the man with the black object in his hand is slightly blurry, the man’s hat with the stripe can be seen clearly. And the fact that the video can be viewed “frame by frame” made it possible for Detective Reese and the forensic video specialist (who examined the videos independently from Detective Reese) to follow that same person through the bar and onto the street, where a clearer picture of him could be obtained and his identity could be determined.

{¶50} After reviewing the entire record in this case, we find that there was no manifest necessity for a mistrial. The court took quick, decisive action to limit any damage caused by the objectionable comment by immediately telling the jury to disregard the testimony and by giving a more comprehensive curative instruction after the sidebar. Moreover, no other testimony or argument was propounded on McMiller’s post-*Miranda* silence. And the evidence establishing that McMiller possessed a gun inside the bar,

without the objectionable testimony, was such that no reasonable juror could have entertained a reasonable doubt as to his guilt. *Thomas*, 8th Dist. Cuyahoga No. 78570, 2002-Ohio-4026, at ¶ 29, citing *Motley*, 21 Ohio App.3d 240, 486 N.E.2d 1259. Accordingly, we find that even without the introduction of McMiller's post-*Miranda* silence and request to speak to an attorney, the outcome of the trial would have been the same, i.e., the error was harmless.

{¶51} Therefore, the trial court did not abuse its discretion when it denied McMiller's motion for mistrial because "the ends of justice" did not "so require," nor was "a fair trial * * * no longer possible." *Drummond*, 111 Ohio St.3d, 2006-Ohio-5084, 854 N.E.2d 1038, at ¶ 131, quoting *Brinkley*, 105 Ohio St.3d 231, 2005-Ohio-1507, 824 N.E.2d 959.

{¶52} McMiller's second assignment of error is overruled.

{¶53} Judgment affirmed.

It is ordered that appellee recover from appellant 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.

–
MARY J. BOYLE, JUDGE

MELODY J. STEWART, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR