

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY

STATE OF OHIO

Appellee

v.

PATRICK MILLER

Appellant

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C.A. No. 2022-CA-58

Trial Court Case No. 22-CR-0346

(Criminal Appeal from Common Pleas
Court)

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OPINION

Rendered on July 21, 2023

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CHRISTIAN W. SORG, Attorney for Appellee

BRIANA C. BREault and JON PAUL RION, Attorneys for Appellant

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WELBAUM, P.J.

{¶ 1} Appellant, Patrick Miller, appeals from his conviction in the Clark County Court of Common Pleas after a jury found him guilty of first-degree-felony kidnapping with a firearm specification and misdemeanor assault. In support of his appeal, Miller contends that he was denied his constitutional right to due process because the State failed to disclose material evidence that was favorable to his case in violation of *Brady v.*

Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). In the alternative, Miller claims that even if this court finds there was no *Brady* violation, he was still deprived of his right to due process by virtue of the State's committing multiple discovery violations. Miller also contends that the State made a prejudicial comment about his decision not to testify at trial that violated his constitutional right to remain silent. Miller further contends that he was denied his constitutional right to a fair trial because the State engaged in prosecutorial misconduct during its rebuttal closing argument and because the trial court provided a faulty, incomplete jury instruction on his affirmative defense to kidnapping. Miller additionally contends that the cumulative effect of all the aforementioned errors deprived him of his right to a fair trial. For the reasons outlined below, we disagree with all of Miller's claims and will affirm the judgment of the trial court.

Facts and Course of Proceedings

{¶ 2} On April 19, 2022, a Clark County grand jury returned an indictment charging Miller with one first-degree-felony count of kidnapping in violation of R.C. 2905.01(A)(3) and one second-degree-felony count of felonious assault in violation of R.C. 2903.11(A)(1). Each count included a firearm specification and a forfeiture specification for the firearm that was used during the offenses. The charges and specifications arose from allegations that on the night of April 2, 2022, and into the early morning hours of April 3, 2022, Miller restrained, severely beat, choked, and waterboarded his former fiancée ("the victim") in the home they shared together in Springfield, Ohio. It was also alleged that Miller pointed a handgun at the victim and threatened to kill her and her

family.

{¶ 3} Miller pled not guilty and the matter proceeded to a three-day jury trial. The State presented testimony from the victim, two responding police officers, and the records keeper for recorded 9-1-1 calls. The defendant did not testify at trial and did not call any witnesses to testify on his behalf. The following is a summary of the testimony and evidence that was presented at trial.

{¶ 4} The victim and Miller met through a dating website in June 2021. By October 2021, the pair had become engaged and had begun living together full time at the victim's residence in Springfield, Ohio. On the evening of April 2, 2022, Miller and the victim were at their house playing card games and drinking alcohol. During that time, Miller, who the victim described as someone who "hates to lose at anything" and is "super competitive," began asking the victim if she was challenging him. Trial Tr. Vol. I, p. 132. Later on, Miller began bending the victim's arm behind her back and bending the victim's fingers backward in a painful manner. Miller continued to engage in such conduct and thought the conduct was funny despite the victim's telling him that it hurt and that she wanted him to stop.

{¶ 5} In response to Miller's conduct, the victim pushed Miller out of his chair and attempted to bend his arm behind his back in an effort to show him how it felt. After she did this, Miller's demeanor changed and the victim became frightened of him. To protect herself, the victim purposely broke the body of her wine glass, held up the stub of the glass, and told Miller to stay away from her. The victim then went into the kitchen to throw the broken glass away in the trash can. In doing so, she slammed her foot on the

trash can pedal to open its lid. When the victim did this, Miller's empty whiskey glass, which had been sitting atop the trash can lid, flew off the trash can and broke. Thereafter, the victim ran into the back guest bedroom and barricaded herself by placing her back against the bedroom door and her feet against the wall.

{¶ 6} While the victim was barricaded in the bedroom, she and Miller began arguing. Miller then pushed against the bedroom door until he broke the door off its hinges overtop the victim. After breaking the door down, Miller threw the door on the bed and blamed the victim for breaking the door. Miller then grabbed the victim and took her toward the living room. While moving toward the living room, the victim and Miller began wrestling with one another in the hallway, because the victim tried to get her cell phone and keys so that she could leave.

{¶ 7} During the struggle, the victim tried to hit Miller's eyes and broke his necklace in the process. Miller, however, would not let the victim leave and wrestled her to the ground. The victim squeezed Miller's testicles in an effort to escape. Miller told the victim that if she did that one more time he was going to kill her. As the victim continued trying to escape, Miller started punching the victim on the left side of her head until she blacked out.

{¶ 8} The next thing the victim remembered was waking up on the hallway floor; she was lying on her stomach with a bloody nose and her arms sprawled out in front of her. After she regained consciousness, Miller took off her engagement ring from her left hand and her Claddagh ring from her right hand. He then put the Claddagh ring in the door frame of the hallway closet and smashed it in the door frame three times. The victim

then tried to crawl away, but Miller began hitting her again and choking her.

{¶ 9} The victim testified that she was in and out of consciousness throughout the night because Miller kept waking her up and hitting her. The victim also testified that Miller told her that if she moved or reported anything to the police, he would kill her and her entire family. Eventually, the victim realized that she would not be able to escape and that the more she yelled and tried to fight back, the more Miller would hit her. The victim testified that, at some point, Miller started to record videos of her on his cell phone during which he would make her say that she was not mentally stable, that everything was her fault, and that she did not want to press charges against him. The victim testified that she had said whatever Miller wanted her to say in order to stay alive.

{¶ 10} The victim also recalled Miller saying that he was going to torture her until he decided what to do with her; part of Miller's torture was pressing his thumbs down on her eyes in an effort to gouge them out. The victim also testified that Miller waterboarded her by pouring glasses of water over her mouth and nose while making her raise her arms above her head. After the waterboarding, Miller made the victim sit up, which resulted in her vomiting on the kitchen floor.

{¶ 11} In addition, the victim recalled Miller saying that his DNA and fingerprints were all over her and that she needed to take a shower. Thereafter, Miller drug the victim into the bathroom, where she threw up in the toilet; Miller looked in the mirror and told the victim that she had scratched his face. He then used his cell phone to show the victim what her face looked like.

{¶ 12} Thereafter, Miller went into the bedroom and returned to the bathroom with

his gun case. The victim testified that Miller took out his gun, loaded it in front of her, removed the gun's safety mechanism, put the gun in his dominant (left) hand, and pointed it at her. While the gun was pointed at her, Miller asked the victim whether or not he should shoot and kill himself. The victim testified that she told Miller to put the gun down and that Miller once again asked whether he should kill himself. The victim continued to tell Miller to put the gun down, and he eventually laid the gun on the bathroom counter. Miller then made the victim take a shower.

{¶ 13} After the victim showered, Miller eventually allowed her to go to the master bedroom and lie down. The victim testified that Miller slept next to her on the bed and told her that "if you try to leave, if you call the police, if you do anything at all I'm going to kill you." Trial Tr. Vol. I, p. 162. At approximately 8 a.m. the next morning, the victim woke up and recovered her cell phone, which was lying on the bed next to Miller. The victim then went into the bathroom and turned on her phone, but Miller followed her into the bathroom before she could make a call. The victim quickly hid her phone under a hand towel on the bathroom counter. When Miller noticed that the victim's phone was missing, the victim played dumb and told Miller that she did not know where the phone was.

{¶ 14} After Miller found the phone in the bathroom, he eventually gave it to the victim after she told him that she needed to call off from work due to her injuries. However, instead of calling her employer, the victim dialed 9-1-1. To keep Miller from discovering that she had called 9-1-1, the victim held the phone by her abdomen so that the operator could hear her and Miller's conversation. The victim eventually began

responding to the operator's questions, and the police arrived shortly thereafter.

{¶ 15} Officer Joshua Lish of the Springfield Police Department testified that he responded to the residence in question and spoke with the victim. Ofc. Lish testified that when he encountered the victim, she was in distress, very shaken up, and crying; she reported how Miller had abused her and how the altercation had started. According to Lish, the victim indicated that the altercation had started because Miller was losing at cards and was bending the victim's arm behind her back and her fingers backward.

{¶ 16} While at the residence, Ofc. Lish observed blood on the hallway door and carpet. He also observed what he described as a large amount of either blood or vomit on the kitchen floor. In addition, Lish observed that the back bedroom door had been ripped off the door frame and that the previously attached door was lying on the bed; the victim had red marks underneath both of her eyes, very severe bruising and redness all over her face, a swollen jaw, a large knot in the middle of her forehead, and bruising on her arms. Lish identified several photographs that he had taken of the victim's injuries and residence, all of which were admitted into evidence at trial. The State also presented medical records establishing that the victim had suffered a contusion of the scalp, neck strain, and a concussion that resulted in balance issues.

{¶ 17} Officer Tim Melvin, the second Springfield police officer who arrived at the scene, testified to speaking with Miller regarding the altercation. According to Ofc. Melvin, Miller claimed that he and the victim had gotten into an argument and that he had slapped the victim in self-defense. Melvin testified that the only injuries he observed to Miller's person were two scratches on Miller's forehead and a small scratch below his

eye. Melvin also testified that he collected Miller's firearm and cell phone, which were both admitted into evidence at trial.

{¶ 18} Several videos from the night in question were recovered from Miller's cell phone and admitted into evidence at trial. See State's Exhibit 3. The first video was from 11:42 p.m. on April 2, 2022. In that video, Miller recorded a conversation between him and the victim while the victim was barricading herself in the guest bedroom. The victim can be heard telling Miller to leave her alone and to stop physically threatening her. The victim also discussed the ways in which Miller had physically threatened her that evening. Miller then got upset and could be seen breaking the door down.

{¶ 19} The next video was at 12:29 a.m. on April 3, 2022. Although the picture was not in view, the victim could be heard saying in an angry voice: "So here I am being beat to shit. Got punched in the face how many times." Miller responded by saying: "Yeah." The victim then said: "Patrick wants me to say that I started it, that I got myself beat up." Miller responded: "Oh wait, you did what? You pushed me off the chair first?" The victim then said: "After you threatened to break my arm, and tried to break my arm and my finger how many times?"

{¶ 20} At 12:33 a.m., Miller recorded yet another video. In this video, the victim's demeanor had changed from anger to distress. The video showed a close-up shot of the victim's bloodied face while she was lying on the floor. During the video, Miller prodded the victim to say that she did not want to press charges against him. Specifically, Miller could be heard saying: "What's the matter [victim's name]? You don't want what?" In a distressed voice, the victim responded: "I don't want anything from

you.” Miller then prodded the victim again, saying: “You don’t want to press any charges against me?” The victim then said: “I don’t want anything from you. I don’t want to press any charges against you.” Miller thereafter made the victim identify him by his full name and birthdate.

{¶ 21} A video taken at 12:42 a.m. showed another close-up shot of the victim’s bloodied face. The video also showed Miller sitting on top of the victim’s chest with his legs straddling her neck, making it difficult for her to breathe and talk. The video further showed that Miller was using his legs to pin down the victim’s arms so that she could not move. At one point in the video, Miller said: “What’s the matter? What are you sorry for?” In response, the victim said in a breathless voice: “I’m sorry for everything. I’m sorry for everything Patrick.” Miller then said: “What did you do?” The victim responded: “I was a cunt to you.” Thereafter, Miller kept asking the victim: “Why were you a cunt?” In response, the victim eventually said: “Because I am * * * I treated you like shit Patrick.” Miller then said: “Yeah. You pushed me off a chair. You tried to pin my arms behind my back. Yeah. Is that what you did? Why did you do that?” The victim responded: “Because I’m a cunt Patrick.”

{¶ 22} Miller took another video at 12:50 a.m., which showed the victim lying on the floor curled up in fear and covering her face with her shirt. During that video, Miller prodded the victim to say: “I’m sorry for starting everything on April 3rd.” Thereafter, Miller said: “You’re sorry for physically abusing me on April 3rd? * * * Who did you physically abuse on April 3rd?” Miller then prodded the victim to say his full name and birthdate. Miller also made the victim confirm that everything he had done was in self-

defense and he eventually said: “[Y]up, so I did that, yeah.” Miller then told the victim to let him see her face and he rolled her over. When the victim rolled over, she had a fearful look on her face and fresh blood running from her nose.

{¶ 23} Miller also took two videos at 2:17 a.m., which showed the victim lying on the kitchen floor next to a box of doughnuts that Miller had thrown at her. During both videos, Miller prodded the victim to say that she was “not a mentally stable person.” At 2:34 a.m., Miller took another video showing the victim still on the kitchen floor. In this video, the victim was breathing heavily and hunching over a large amount of red vomit. Toward the end of the video, Miller threw an apron at the victim and said: “You’re making a mess.”

{¶ 24} After the foregoing testimony and evidence was presented to the jury, the jury deliberated and found Miller guilty of first-degree-felony kidnapping and the associated firearm specification. The jury, however, did not find Miller guilty of felonious assault, but instead found him guilty of the lesser-included-offense of assault, a first-degree misdemeanor. The jury also found that Miller’s firearm was an instrumentality that was subject to forfeiture.

{¶ 25} At sentencing, the trial court ordered Miller to serve an indefinite term of 11 to 16.5 years in prison for kidnapping and a consecutive three-year prison term for the firearm specification. The trial court also sentenced Miller to six months in jail for assault, which, by law, had to be served concurrently with the sentence for kidnapping. Accordingly, the trial court sentenced Miller to an aggregate indefinite term of 14 to 19.5 years in prison.

{¶ 26} Miller now appeals from his convictions and raises four assignments of error for review.

First Assignment of Error

{¶ 27} Under his first assignment of error, Miller contends that he was denied his constitutional right to due process because the State committed a *Brady* violation. In *Brady*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215, “the United States Supreme Court held that ‘the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.’ ” *State v. Iacona*, 93 Ohio St.3d 83, 89, 752 N.E.2d 937 (2001), citing *Brady* at 87. Therefore, “*Brady* imposes on the government an obligation to turn over evidence that is both favorable to the defendant and material to guilt or punishment.” *State v. Osie*, 140 Ohio St.3d 131, 2014-Ohio-2966, 16 N.E.3d 588, ¶ 154.

{¶ 28} “Evidence is material if there is a ‘ “reasonable probability” ’ that the result of the trial would have been different had the evidence been disclosed to the defense.” *Id.* at ¶ 153, quoting *Kyles v. Whitley*, 514 U.S. 419, 433, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). (Other citation omitted.) “ ‘Materiality pertains to the issue of guilt or innocence, and not to the defendant’s ability to prepare for trial.’ ” *Id.* at ¶ 154, quoting *United States v. Bencs*, 28 F.3d 555, 560 (6th Cir.1994). (Other citation omitted.) “ ‘Thus, *Brady* generally does not apply to delayed disclosure of exculpatory information, but only to a complete failure to disclose.’ ” *Id.* at ¶ 155, quoting *Bencs* at 560. In other

words, “*Brady* is not violated when disclosure occurs during trial, even when disclosure surprises the defendant with previously undisclosed evidence.” *Iacona* at 100, citing *State v. Wickline*, 50 Ohio St.3d 114, 116, 552 N.E.2d 913 (1990). In that circumstance, “a trial court has authority, pursuant to Crim.R. 16[(L)], to grant a continuance or make other orders that the court deems just to ensure that the recently disclosed information can be evaluated, and used at defense counsel’s option before the trial is concluded.” *Id.*

{¶ 29} In this case, Miller claims that the State committed a *Brady* violation because it failed to produce a nine-page statement that the victim had written and e-mailed to the prosecutor two months before trial. Miller claims that the statement was material evidence that was favorable to the defense because it set forth a version of events that was, in some respects, inconsistent with victim’s trial testimony, 9-1-1 call, and prior written statements.

{¶ 30} The nine-page statement was discovered during trial while Miller’s trial counsel was cross-examining the victim. See Trial Tr. Vol. I, p. 212-213. The same day the statement was discovered, the State recovered the e-mail in question and provided the attached statement to the defense. Therefore, the State did not completely fail to disclose the statement. Rather, there was a delayed disclosure of the statement during trial, which did not amount to a *Brady* violation. See *Iacona* at 100; *State v. Hartley*, 2d Dist. Montgomery No. 29510, 2023-Ohio-158, ¶ 39-40.

{¶ 31} “It has, however, been held that the philosophical underpinnings of *Brady* support the conclusion that even disclosure of potentially exculpatory evidence during

trial may constitute a due process violation if the late timing of the disclosure significantly impairs the fairness of the trial.” *Iacona* at 100. But “ ‘[n]o due process violation occurs as long as *Brady* material is disclosed to a defendant in time for its effective use at trial.’ ” *Id.*, quoting *United States v. Smith Grading & Paving, Inc.*, 760 F.2d 527, 532 (4th Cir.1985). (Other citations omitted.) “ ‘Delay only violates *Brady* when the delay itself causes prejudice.’ ” *Osie*, 140 Ohio St.3d 131, 2014-Ohio-2966, 16 N.E.3d 588, at ¶ 155, quoting *United States v. Patrick*, 965 F.2d 1390, 1400 (6th Cir.1992).

{¶ 32} Here, Miller argues that the delayed disclosure of the victim’s nine-page statement prejudiced him because it prevented him from effectively using the statement at trial. Specifically, Miller claims that his trial counsel did not have enough time to review the statement for purposes of cross-examining the victim. Miller also claims that the statement was essential to his defense strategy and that the late disclosure of the statement prevented his trial counsel from effectively preparing for trial. We do not find either of Miller’s arguments to be persuasive.

{¶ 33} With regard to review time, Miller’s trial counsel had over a day to review the victim’s nine-page statement. The morning after the statement was discovered, Miller’s trial counsel moved to dismiss the case based on the delayed disclosure, and a full hearing was immediately held on that matter. See Trial Tr. Vol. II, p. 217-258. The arguments raised by Miller’s trial counsel during the hearing indicated that counsel had reviewed the statement and was already aware of some of the inconsistencies that the statement presented. Although the trial court overruled Miller’s motion to dismiss, it granted Miller a one-day trial continuance for his counsel to further review the statement

in preparation for the continued cross-examination of the victim. When considering the time Miller's trial counsel had to review the statement before the motion to dismiss hearing and the subsequent one-day continuance granted by the trial court, we disagree with Miller's claim that his counsel did not have enough time to review the statement.

{¶ 34} We also disagree with Miller's claim that the delayed disclosure of the statement prevented his trial counsel from effectively preparing his defense. Because the video evidence taken from Miller's cell phone made it clear that Miller had, at the very least, assaulted and unlawfully restrained the victim, the defense's theory of the case was that Miller had been overcharged with felonious assault and kidnapping due to insufficient evidence of Miller causing serious physical harm to the victim and (for purposes of kidnapping) terrorizing the victim. Given the nature of the video evidence, and given that the statement at issue did not present a recantation or any new evidence or witnesses, we fail to see how the statement would have changed the defense's trial strategy. Indeed, the nine-page statement presented nothing more than a few minor chronological inconsistencies with the victim's trial testimony. For the most part, the statement was consistent with the victim's prior accounts of the incident and the video evidence. Because of this, we are not convinced that the statement even qualified as material evidence, as there is not a reasonable probability that the result of the trial would have been different had the statement been timely disclosed.

{¶ 35} For all the foregoing reasons, Miller's *Brady* claim fails.

{¶ 36} As an alternative argument, Miller asserts that even if there was no *Brady* violation, he was still denied his constitutional right to due process because the State

committed multiple discovery violations under Crim.R. 16. According to Miller, the trial court's decision to grant a one-day trial continuance was an insufficient sanction for the discovery violations in this case. Miller claims that the trial court should have instead granted his motion to dismiss the case.

{¶ 37} Pursuant to Crim.R. 16(B), the State is required to provide the defense with certain evidentiary materials in discovery, including, but not limited to, items “which are material to the preparation of a defense, or are intended for use by the prosecuting attorney as evidence at the trial[.]” Crim.R. 16(B). This includes “[a]ny evidence favorable to the defendant and material to guilt or punishment” and “[a]ny written or recorded statement by a witness in the state’s case-in-chief[.]” Crim.R. 16(B)(5) and (7).

{¶ 38} “A violation of Crim.R. 16 does not necessarily amount to a due process violation.” *State v. Wilcoxson*, 2d Dist. Montgomery No. 29053, 2021-Ohio-4339, ¶ 38, citing *State v. Long*, 2d Dist. Greene No. 2010-CA-47, 2011-Ohio-4293, ¶ 19; *Kyles*, 514 U.S. 419 at 433, 115 S.Ct. 1555, 131 L.Ed.2d 490, citing *U.S. v. Bagley*, 473 U.S. 667, 675, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) (“the Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense.”). This court has explained that the failure to provide evidence in discovery is not a per se denial of the right to due process because “there must be evidence of some prejudice to the defendant.” (Citations omitted.) *Long* at ¶ 21. *Accord Wilcoxson* at ¶ 38.

{¶ 39} If a party fails to comply with the disclosure requirements of Crim.R. 16, the trial court has the discretion to “order such party to permit the discovery or inspection,

grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances.” Crim.R. 16(L)(1). “In exercising its discretion when the discovery violation is committed by the State, trial courts should consider: (1) whether the failure to disclose was a willful violation of Crim.R. 16, (2) whether foreknowledge of the undisclosed material would have benefitted the accused in the preparation of a defense, and (3) whether the accused was prejudiced.” *State v. Hunt*, 2d Dist. Darke No. 2018-CA-9, 2019-Ohio-2352, ¶ 30, citing *State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971, ¶ 35, citing *State v. Parson*, 6 Ohio St.3d 442, 453 N.E.2d 689 (1983).

{¶ 40} “[W]hen deciding whether to impose a sanction, [the trial court] must impose the least severe sanction that is consistent with the purpose of the rules of discovery.” *Lakewood v. Papadelis*, 32 Ohio St.3d 1, 511 N.E.2d 1138 (1987), paragraph two of the syllabus. “The purpose of the discovery rules ‘is to prevent surprise and the secreting of evidence favorable to one party.’ ” *Darmond* at ¶ 19, quoting *Lakewood* at 3.

{¶ 41} The trial court’s response to an alleged discovery violation under Crim.R. 16 is reviewed for an abuse of discretion. *Parson* at 445. “A trial court abuses its discretion when it makes a decision that is unreasonable, unconscionable, or arbitrary.” (Citation omitted.) *Darmond*, at ¶ 34. “An abuse of discretion includes a situation in which a trial court did not engage in a ‘ “sound reasoning process.” ’ ” *Id.*, quoting *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶ 14, quoting *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990). “Abuse-of-discretion review is deferential and does not

permit an appellate court to simply substitute its judgment for that of the trial court.” *Id.*

{¶ 42} Although Miller contends that there were *multiple* discovery violations, the only discovery violation that was objected to and ruled on by the trial court was the delayed disclosure of the victim’s nine-page statement. Following a full hearing on that matter, the trial court found that the State’s discovery violation had been negligent, but not willful, since the prosecutor simply forgot to open the statement that had been attached to the victim’s e-mail. Upon review, we find that the trial court’s determination in that regard was reasonable and not an abuse of discretion.

{¶ 43} The trial court also found that the nine-page statement at issue simply presented inconsistencies in the victim’s version of events that the defense could use to attack the victim’s credibility on cross-examination. Because the defense was still in the process of cross-examining the victim, the trial court determined that the defense still had the opportunity to attack the victim’s credibility in that manner. In other words, the trial court did not find that the delayed disclosure prejudiced the defense since the information in the statement could still be addressed at trial. This determination was also reasonable and not an abuse of discretion.

{¶ 44} As previously discussed, the trial court granted the defense a one-day trial continuance to address the delayed disclosure of the statement. We find that such a sanction was reasonable and not an abuse of discretion. In our view, dismissing the case, as Miller requested, would have run afoul of the requirement for the trial court to impose the least severe sanction that is consistent with the purpose of the rules of discovery.

{¶ 45} The only other discovery violation alleged by Miller was the failure of the State to timely provide DNA evidence that was collected from Miller's shoe and the victim. The record establishes that the State disclosed the DNA evidence to the defense immediately before opening statements at trial. During that disclosure, the State indicated on the record that it did not previously have the DNA evidence because it was either not provided by the police department or was somehow "lost in communication." Trial Tr. Vol. I, p. 110. After disclosing the DNA evidence, the State advised that it did not intend to use the evidence at trial and noted that the evidence merely established that the victim's blood was on Miller's shoe. The parties thereafter agreed that the DNA evidence was not exculpatory, and the defense raised no objection to its delayed disclosure. *Id.* at 111-112.

{¶ 46} Because the defense did not raise an objection, the delayed disclosure of the DNA evidence may only be reviewed for plain error on appeal. *State v. Mieczkowski*, 2018-Ohio-2775, 115 N.E.3d 758, ¶ 60 (7th Dist.) ("The failure to properly object to evidence on the basis of a Crim.R. 16 violation operates as a forfeiture of all but plain error on appeal."). "To prevail on plain-error review, [the appellant] must establish both that misconduct occurred and that but for the misconduct, the outcome of the trial clearly would have been otherwise." (Citations omitted.) *State v. Mammone*, 139 Ohio St.3d 467, 2014-Ohio-1942, 13 N.E.3d 1051, ¶ 111.

{¶ 47} In this case, the outcome of Miller's trial would not have been different had the State timely disclosed the DNA evidence. The DNA evidence was not helpful to the defense, as it established that the victim's blood was on Miller's shoe, which supported

Miller's assault conviction. If anything, Miller benefited from the delayed disclosure since it resulted in the State's not using the DNA evidence at trial.

{¶ 48} Miller's argument with regard to the delayed disclosure of the DNA evidence is simply an attempt to show that the State engaged in a pattern of withholding evidence. However, nothing in the record suggests that the State withheld the DNA evidence, as the State voluntarily disclosed the DNA evidence when it became available. Moreover, the delayed disclosure of the DNA evidence was clearly not willful, as the State gained nothing from failing to disclose evidence that was favorable to its case.

{¶ 49} For the foregoing reasons, in addition to finding no *Brady* violation, we do not find that Miller's right to due process was violated by the State's discovery violations. We also do not find that the trial court abused its discretion by granting a one-day trial continuance in response to the State's delayed disclosure of the victim's nine-page statement.

{¶ 50} Miller's first assignment of error is overruled.

Second Assignment of Error

{¶ 51} Under his second assignment of error, Miller contends that during the State's rebuttal closing argument, the prosecutor made a prejudicial comment about his decision not to testify at trial that violated his constitutional right to remain silent. We disagree.

{¶ 52} "[A] prosecutor's comments regarding a defendant's refusal to testify violat[e] the accused's Fifth Amendment right to remain silent." *State v. Thompson*, 33

Ohio St.3d 1, 4, 514 N.E.2d 407 (1987), citing *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). “Comments by prosecutors on the * * * refusal to testify by defendants have always been looked upon with extreme disfavor because they raise an inference of guilt from a defendant’s decision to remain silent.” *Id.* “In effect, such comments penalize a defendant for choosing to exercise a constitutional right.” *Id.* “Prosecutors must therefore take care not to equate the defendant’s silence to guilt” and “must be aware that where such comments work to the material prejudice of the defendant, they will not be tolerated.” (Citations omitted.) *Id.*

{¶ 53} That said, “[a] prosecutor’s reference to ‘uncontradicted evidence is not a comment on the accused’s failure to testify.’ ” *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, 781 N.E.2d 88, ¶ 94, quoting *State v. Ferguson*, 5 Ohio St.3d 160, 450 N.E.2d 265 (1983), paragraph one of the syllabus. “Moreover, isolated comments by a prosecutor are not to be taken out of context and given their most damaging meaning.” (Citation omitted.) *Id.*

{¶ 54} In this case, Miller claims that the following comment by the prosecutor violated his right to remain silent:

Does he even deny it? Does he ever say that’s not what he did, that’s not what happened? Does he ever say, I didn’t hit you, I didn’t punch you? No. He sure doesn’t, does he? This is probably the only time during this closing argument that I’m going to agree with Defense Counsel

* * * [.]

Trial Tr. Vol. III, p. 369.

{¶ 55} Upon review, we find that Miller's argument takes the foregoing comment out of context. The record establishes that the prosecutor made the comment just after playing one of the cell phone videos that was admitted into evidence. In that video, the victim can be heard accusing Miller of beating her, and Miller cannot be heard denying the accusation. Instead, Miller can be heard saying "yeah" when the victim stated that he had punched her in the face multiple times. See State's Exhibit 3 at 12:29 a.m. Therefore, when the prosecutor made the comment: "Does he even deny it? Does he ever say that's not what he did, that's not what happened? Does he ever say, I didn't hit you, I didn't punch you? No. He sure doesn't, does he?" The prosecutor was referring to what was depicted in the video, not to Miller's decision to remain silent at trial. Therefore, we find nothing inappropriate about the prosecutor's comment; the comment was simply referencing the video evidence.

{¶ 56} Miller's second assignment of error is overruled.

Third Assignment of Error

{¶ 57} Under his third assignment of error, Miller contends that he was denied his constitutional right to a fair trial because: (1) the State engaged in prosecutorial misconduct during its rebuttal closing argument; and (2) the trial court provided a "faulty" and "incomplete" jury instruction on his affirmative defense to kidnapping. For the reasons outlined below, we disagree with both of Miller's claims.

1. Prosecutorial Misconduct

{¶ 58} “The test for prosecutorial misconduct is whether remarks [or prosecutors’ actions] were improper and, if so, whether they prejudicially affected substantial rights of the accused.” *State v. Jones*, 90 Ohio St.3d 403, 420, 739 N.E.2d 300 (2000), citing *State v. Smith*, 14 Ohio St.3d 13, 14, 470 N.E.2d 883 (1984). “The touchstone of the analysis ‘is the fairness of the trial, not the culpability of the prosecutor.’ ” *State v. Garrett*, Ohio Slip Opinion No. 2022-Ohio-4218, ___ N.E.3d ___, ¶ 144, quoting *Smith v. Phillips*, 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). “Where it is clear beyond a reasonable doubt that a jury would have found the defendant guilty even absent the alleged misconduct, the defendant has not been prejudiced, and his conviction will not be reversed.” *State v. Stevenson*, 2d Dist. Greene No. 2007-CA-51, 2008-Ohio-2900, ¶ 42, citing *State v. Loza*, 71 Ohio St.3d 61, 78, 641 N.E.2d 1082 (1994).

{¶ 59} Prosecutors are afforded wide latitude in the presentation of their closing arguments. *State v. Arrone*, 2d Dist. Greene No. 2005-CA-89, 2006-Ohio-4144, ¶ 126; *State v. Lott*, 51 Ohio St.3d 160, 165, 555 N.E.2d 293 (1990). They may comment freely on “ ‘what the evidence has shown and what reasonable inferences may be drawn therefrom.’ ” *Lott* at 165, quoting *State v. Stephens*, 24 Ohio St.2d 76, 82, 263 N.E.2d 773 (1970). Accord *State v. Baker*, 159 Ohio App.3d 462, 2005-Ohio-45, 824 N.E.2d 162, ¶ 19 (2d Dist.). “Both parties * * * may be ‘colorful or creative’ [during closing arguments] but not purely abusive, inflammatory, or purely derogatory.” *State v. Whitaker*, 169 Ohio St.3d 647, 2022-Ohio-2840, 207 N.E.3d 677, ¶ 96, quoting *State v. Brown*, 38 Ohio St.3d 305, 317, 528 N.E.2d 523 (1988).

{¶ 60} Prosecutors may not make statements that are “so inflammatory as to

render the jury's decision a product solely of passion and prejudice against the appellant." (Citation omitted.) *State v. Williams*, 23 Ohio St.3d 16, 20, 490 N.E.2d 906 (1986). "Where it appears that prosecutorial comments constituted an invitation to the jury to go beyond the evidence or were so flagrant as to incite the passions or prejudice of the jury, and thereby deny the accused a fair trial, prejudicial error may inhere." *State v. Slagle*, 8th Dist. Cuyahoga No. 55759, 1990 WL 82138, *9 (June 14, 1990), citing *State v. Price*, 60 Ohio St.2d 136, 140, 398 N.E.2d 772 (1979).

{¶ 61} In this case, Miller claims that the State engaged in prosecutorial misconduct during its rebuttal closing argument because the prosecutor frequently referenced his defense counsel in a manner that denigrated counsel and attacked counsel's credibility. Specifically, Miller takes issue with the following comments by the prosecutor:

1. "Defense [c]ounsel wants you to believe that at this point Mr. Miller [is] confused." Trial Tr. Vol. III, p. 368.
2. "Patrick Miller hired himself a very good [d]efense [a]ttorney because he had to." *Id.* at 372.
3. "[Defense counsel] does his job and he does it well and he's trying to confuse the issues for you. He's trying to paint a picture of this night is [sic] something that it wasn't." *Id.* at 372.
4. Defense has done its best to minimize what happened here and that is displayed abundantly in the statement that [c]ounsel made where he said, Mr. Miller didn't use a weapon or a knife." *Id.* at 377.

{¶ 62} Upon review, we find that comment 1, i.e., “Defense [c]ounsel wants you to believe that at this point Mr. Miller [is] confused[,]” did not denigrate Miller’s trial counsel. When making that comment, the prosecutor was refuting a claim by the defense that Miller did not understand why the victim had become upset and why she had barricaded herself in the bedroom. See Trial Tr. Vol. III, p. 361 and 368. Indeed, the video evidence established that when the victim barricaded herself, she specifically told Miller that she was upset because he had physically threatened her. See State’s Exhibit 3 at 11:42 p.m. Therefore, the prosecutor’s comment did not denigrate Miller’s counsel, but simply refuted counsel’s assertion that Miller was confused. Because the comment was not improper, it cannot form the basis of a prosecutorial misconduct claim.

{¶ 63} Comment 4, i.e., “Defense has done its best to minimize what happened here and that is displayed abundantly in the statement that counsel made where he said, Mr. Miller didn’t use a weapon or a knife[,]” did not denigrate Miller’s trial counsel either. When making that comment, the prosecutor was accurately pointing out the defense’s trial strategy. The defense made it clear in opening and closing arguments that it was going to establish, in part, that Miller had been overcharged with felonious assault and kidnapping because Miller had not caused serious physical harm to the victim. In proceeding with this strategy, the defense attempted to minimize the severity of the victim’s injuries and Miller’s actions by arguing that Miller did not use a weapon to harm the victim. When making comment 4, the prosecutor simply pointed this strategy out to the jury and then attacked it by arguing that Miller used his fists to cause the victim serious physical harm in the form of a blackout and severe concussion. See Trial Tr. Vol. III, p.

377-378. Accordingly, the purpose of the prosecutor's comment was not to belittle or denigrate Miller's trial counsel, but to attack the defense's trial strategy in a manner that was not improper.

{¶ 64} Even if comment 4 had been improper, the comment clearly did not prejudice Miller because the jurors ultimately determined that the victim had not suffered serious physical harm at the hands of Miller, given that it found Miller not guilty of felonious assault but guilty of assault. Because comment 4 did not result in any prejudice, it cannot form the basis of a prosecutorial misconduct claim.

{¶ 65} Comments 2 and 3, on the other hand, reference how Miller needed to hire a good defense attorney and how Miller's trial counsel was doing his job well by confusing the issues. Comments of that nature are improper, as they denigrate defense counsel for doing his or her job. See *State v. Bey*, 85 Ohio St.3d 487, 493-494, 709 N.E.2d 484 (1999); *State v. Getsy*, 84 Ohio St.3d 180, 194, 702 N.E.2d 866 (1998); *State v. Keenan*, 66 Ohio St.3d 402, 406, 613 N.E.2d 203 (1993) (improper to characterize defense counsel as "hired guns"). That said, "[n]ot every intemperate remark by counsel can be a basis for reversal." *State v. Landrum*, 53 Ohio St.3d 107, 112, 559 N.E.2d 710 (1990). Again, even when comments are improper, the appellant must show that he was prejudiced by the comments. See *Bey* at 494.

{¶ 66} Here, we find that neither comment 2 nor 3, alone or in the aggregate, prejudicially affected Miller at trial. This is because the prosecutor's remarks were not pervasive; they occurred only once during the rebuttal closing argument. There was also overwhelming evidence supporting Miller's convictions for kidnapping and assault,

meaning it is highly unlikely that the improper comments had any effect on the jury's verdict. Accordingly, the improper comments do not require a reversal of Miller's convictions.

{¶ 67} Miller also argues that the State engaged in prosecutorial misconduct during its rebuttal closing argument by engaging in conduct that was designed to appeal to the jury's emotions. Specifically, Miller takes issue with the State's replay of Miller's cell phone videos for the jury. Although the videos in question were disturbing, the record establishes that the State replayed the videos to refute certain claims made by the defense during its closing argument, i.e., that Miller was confused, that the physical abuse and restraint committed against the victim did not occur over substantial period of time, and that the victim's injuries were not severe and did not get progressively worse during the incident. The videos were also replayed to refute Miller's claim that, for purposes of the kidnapping charge, he did not restrain the victim's liberty in order to terrorize her or to inflict serious physical harm.

{¶ 68} Upon review, we do not find that it was inappropriate for the State to replay the cell phone videos to refute the defense's closing argument. As previously discussed, prosecutors are afforded wide latitude and may be colorful and creative when giving their closing arguments so long as they are not purely abusive, inflammatory, or derogatory. In this case, the State's decision to replay the videos was not purely abusive, inflammatory, or derogatory; the videos were used to refute specific claims made by the defense during its closing argument. Therefore, we find that the State did not engage in prosecutorial misconduct by replaying the cell phone videos.

{¶ 69} In addition to the videos, Miller claims that the following comment by the prosecutor improperly appealed to the jury's emotions: "Defense is asking you in a weird way to have sympathy for Mr. Miller. They are saying that somehow you should keep in mind that you shouldn't be too upset by this evidence. It shouldn't bother you so much that you convict Mr. Miller of kidnapping and felonious assault." Trial Tr. Vol. III, p. 376. Upon review, we do not find this remark to be " 'so inflammatory as to render the jury's decision a product solely of passion and prejudice.' " *Arrone*, 2d Dist. Greene No. 2005-CA-89, 2006-Ohio-4144 at ¶ 126, quoting *Williams*, 23 Ohio St.3d 16 at 20, 490 N.E.2d 906. Even if we were to find that the prosecutor's comment was inappropriate, Miller failed to object to the comment (and a majority of the previously discussed comments) at trial. Therefore, the comment may only be reviewed for plain error on appeal.

{¶ 70} Again, to prevail on plain-error review, it must be established that, but for the misconduct in question, the outcome of trial would have been clearly different. *Mammone*, 139 Ohio St.3d 467, 2014-Ohio-1942, 13 N.E.3d 1051, at ¶ 111. Upon review, we cannot say that the prosecutor's comment impacted the outcome of Miller's trial. As previously discussed, there was overwhelming evidence establishing that Miller had kidnapped and assaulted the victim. In addition, Miller received a favorable verdict on the felonious assault charge, which indicated that the jury's verdict was not based on emotion. Accordingly, it cannot be said that the prosecutor's comment constituted plain error.

{¶ 71} For the foregoing reasons, all of Miller's prosecutorial misconduct claims fail.

2. *Faulty, Incomplete Jury Instruction*

{¶ 72} Miller also claims that he was denied his right to a fair trial due to the trial court's providing a faulty, incomplete jury instruction on his affirmative defense to kidnapping. "When reviewing the trial court's jury instructions, the proper standard of review is whether the trial court's decision to give or exclude a particular jury instruction was an abuse of discretion under the facts and circumstances of the case." (Citation omitted.) *State v. Fair*, 2d Dist. Montgomery No. 24388, 2011-Ohio-4454, ¶ 65; *State v. Blanton*, 2023-Ohio-89, 206 N.E.3d 14, ¶ 25 (2d Dist.). However, whether jury instructions correctly state the law is a legal issue that appellate courts review de novo. *State v. Dean*, 146 Ohio St.3d 106, 2015-Ohio-4347, 54 N.E.3d 80, ¶ 135.

{¶ 73} "An appellate court may not reverse a conviction in a criminal case based upon jury instructions unless 'it is clear that the jury instructions constituted prejudicial error.' " *State v. Portis*, 2d Dist. Montgomery No. 28677, 2021-Ohio-608, ¶ 47, quoting *State v. Jones*, 2015-Ohio-5029, 52 N.E.3d 263, ¶ 13 (12th Dist.). "An appellate court's duty is to review the instructions as a whole, and, if taken in their entirety, the instructions fairly and correctly state the law applicable to the evidence presented at trial, reversible error will not be found premised upon the possibility that the jury may have been misled." *Id.* Therefore, " 'misstatements and ambiguity in a portion of the instructions will not constitute reversible error unless the instructions are so misleading that they prejudicially affect a substantial right of the complaining party.' " *State v. Stoner*, 2d Dist. Miami No. 2003-CA-6, 2003-Ohio-5745, ¶ 11, quoting *Wozniak v. Wozniak*, 90 Ohio App.3d 400,

410, 629 N.E.2d 500 (9th Dist.1993).

{¶ 74} As previously discussed, Miller contends that the trial court gave a faulty, incomplete jury instruction on his affirmative defense to kidnapping. “Under R.C. 2905.01(C)(1), the offense of kidnapping is generally a first-degree felony but may be reduced to a second-degree felony if ‘the offender releases the victim in a safe place unharmed.’ ” *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, 837 N.E.2d 315, ¶ 233. It is well established that this provision is not an element of kidnapping, but an affirmative defense. *Id.*, citing *State v. Sanders*, 92 Ohio St.3d 245, 265, 750 N.E.2d 90 (2001) and *State v. Cornute*, 64 Ohio App.2d 199, 412 N.E.2d 416 (10th Dist.1979), syllabus; *State v. Leslie*, 14 Ohio App.3d 343, 345, 471 N.E.2d 503 (2d Dist.1984).

{¶ 75} In this case, there is no dispute that the trial court’s jury instruction on the affirmative defense in question was limited to the following statement: “If your verdict on kidnapping is guilty, you will continue your deliberations to determine beyond a reasonable doubt * * * whether the Defendant released the victim in a safe place unharmed.” Trial Tr. Vol. III, p. 383-384. Miller claims that this instruction was faulty and incomplete because it did not instruct the jury on how to proceed with its affirmative-defense finding and did not define the phrase “safe place unharmed.” Miller, however, did not object to the instruction at trial, and thus waived all but plain error for appeal. *State v. Underwood*, 3 Ohio St.3d 12, 444 N.E.2d 1332 (1983).

{¶ 76} Miller cites *State v. Love*, 1st Dist. Hamilton No. C-160651, 2017-Ohio-8960, for the proposition that the trial court’s jury instruction amounted to plain error. In *Love*, the appellant appealed his convictions for felonious assault on grounds that the trial

court had provided an incomplete jury instruction on the affirmative defense of defense of others. *Id.* at ¶ 18-19. The appellant claimed that the jury instruction was incomplete because it did not explain how the jury was to proceed after making its affirmative-defense finding, i.e., how the affirmative-defense finding impacted the verdict. *Id.* at ¶ 19-23.

{¶ 77} On appeal, the appellate court in *Love* found that the trial court's jury instruction was incomplete. *Id.* at ¶ 21-23. The appellate court explained that "the trial court's failure to instruct the jury on how to apply its finding on Love's affirmative defense left the jury uninformed as to how to perform its duty." *Id.* at ¶ 23. The court further explained that this failure "affected the outcome of the trial and resulted in a manifest miscarriage of justice" because "the incomplete instruction prevented the jury from properly applying the law to reconcile any finding on the affirmative defense with its finding that the state had proved the elements of felonious assault beyond a reasonable doubt." *Id.* Accordingly, the court held that the incomplete jury instruction amounted to plain error, which warranted the reversal of appellant's conviction and a new trial. *Id.* at ¶ 24-25.

{¶ 78} Upon review, we find that *Love* is distinguishable from the present case. This is because the affirmative-defense finding in the present case affected the degree of Miller's kidnapping offense, not the verdict. The trial court's instruction specifically stated that: "*If your verdict on kidnapping is guilty, you will continue your deliberations to determine beyond a reasonable doubt * * * whether the Defendant released the victim in a safe place unharmed.*" (Emphasis added.) Trial Tr. Vol. III, p. 383-384. It is clear from the instruction that the affirmative-defense finding would be made only if the jury

found Miller guilty of kidnapping. Therefore, there was no need to instruct the jury on how to proceed with its affirmative-defense finding, as the finding did not affect the verdict. Instead, the affirmative-defense finding simply indicated to the trial court whether the kidnapping offense was going to be a first- or second-degree felony. Accordingly, the affirmative-defense instruction was not incomplete like the instruction in *Love*. We therefore find no error, let alone plain error, in that regard.

{¶ 79} We also do not find that the trial court committed plain error by failing to define the phrase “safe place unharmed.” The Supreme Court of Ohio has explained that: “Failure of a trial court to separately and specifically instruct the jury on every essential element of each crime with which an accused is charged does not per se constitute plain error under Crim.R. 52(B).” (Emphasis omitted.) *State v. Adams*, 62 Ohio St.2d 151, 153, 404 N.E.2d 144 (1980), paragraph two of the syllabus; *State v. Wilks*, 154 Ohio St.3d 359, 2018-Ohio-1562, 114 N.E.3d 1092, ¶ 137. “Rather, an appellate court must review the instructions as a whole and the entire record to determine whether a manifest miscarriage of justice has occurred as a result of the error in the instructions.” *State v. Wamsley*, 117 Ohio St.3d 388, 2008-Ohio-1195, 884 N.E.2d 45, ¶ 17, citing *Adams* at paragraph three of the syllabus.

{¶ 80} This court has similarly held that “[t]he failure to define a term [in the jury instructions] * * * will not always require a reversal.” (Citations omitted.) *State v. Hunter*, 2d Dist. Montgomery No. 15436, 1996 WL 430875, *4 (Aug. 2, 1996). We explained that while “courts should define all essential elements of the crime in its charge to the jury[.]” and while “[i]t is especially important for courts to define technical terms, * * * courts should

limit their definitions where possible to those provided by the legislature to avoid confusion and unnecessary appellate challenges.” (Citations omitted.) *Id.* at *3. Therefore, “[i]f the term is of general import and common usage, and the term is actually used in that sense, the failure to define it does not mandate a reversal.” (Citations omitted.) *Id.* at *4.

{¶ 81} In *State v. Wood*, 2d Dist. Greene No. 2006-CA-1, 2007-Ohio-1027, the appellant challenged his convictions for endangering children on grounds that the trial court’s jury instructions failed to define the terms “cruelly abuse” and “torture” as used in the endangering children statute, R.C. 2919.22(B)(2). In response, this court explained that “[t]he court need not define every word used in its instructions” and found that, because the endangering children statute did not define the terms in question, the trial court did not abuse its discretion by failing to provide definitions for those terms in the jury instructions. *Id.* at ¶ 23. We further found that “the jury could properly determine the case by giving the words their common, ordinary meaning.” *Id.*

{¶ 82} In the present case, the phrase “safe place unharmed” is not an essential element of any of Miller’s charged offenses. The phrase is also not defined by statute and is not overly technical. Because it is a simple, nontechnical phrase, we find that the jury could have properly applied the phrase by using its common, ordinary meaning. Accordingly, we do not find that the trial court committed any error, let alone plain error, by failing to define the phrase “safe place unharmed” in the jury instructions.

{¶ 83} Because there was no error in the jury instructions and no prosecutorial misconduct during the State’s rebuttal closing argument, Miller’s claim that he was denied his right to a fair trial on those grounds lacks merit.

{¶ 84} Miller's third assignment of error is overruled.

Fourth Assignment of Error

{¶ 85} Under his fourth assignment of error, Miller contends that he was denied his right to a fair trial based on the cumulative error doctrine. "Under this doctrine, a conviction will be reversed when the cumulative effect of errors in a trial deprives a defendant of a fair trial even though each of the numerous instances of trial-court error does not individually constitute cause for reversal." *State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶ 223, citing *State v. DeMarco*, 31 Ohio St.3d 191, 196-197, 509 N.E.2d 1256 (1987). "[I]n order even to consider whether 'cumulative' error is present, we would first have to find that multiple errors were committed in this case." *State v. Madrigal*, 87 Ohio St.3d 378, 398, 721 N.E.2d 52 (2000). "We then must find a reasonable probability that the outcome of the trial would have been different but for the combination of the separately harmless errors." *State v. Mize*, 2022-Ohio-3163, 195 N.E.3d 574, ¶ 76 (2d Dist.), quoting *State v. Durant*, 159 Ohio App.3d 208, 2004-Ohio-6224, 823 N.E.2d 506, ¶ 38 (2d Dist.).

{¶ 86} In reviewing Miller's first three assignments of error, we did not find multiple errors committed at trial. Because multiple errors were not committed, the cumulative error doctrine is inapplicable to this case. Therefore, Miller's claim that he was denied his right to a fair trial due to cumulative error lacks merit.

{¶ 87} Miller's fourth assignment of error is overruled.

Conclusion

{¶ 88} Having overruled all four assignments of error raised by Miller, the judgment of the trial court is affirmed.

.....

EPLEY, J. and LEWIS, J., concur.