

[Cite as *State v. Mallow*, 2011-Ohio-30.]

IN THE COURT OF APPEALS OF CLARK COUNTY, OHIO

STATE OF OHIO :  
Plaintiff-Appellee : C.A. CASE NO. 09CA0092  
vs. : T.C. CASE NO. 09CR0357  
DARREN MALLOY : (Criminal Appeal from  
Defendant-Appellant : Common Pleas Court)

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O P I N I O N

Rendered on the 7<sup>th</sup> day of January, 2011.

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GRADY, J.:

{¶ 1} Defendant, Darren Malloy, appeals from his conviction and sentence for robbery.

{¶ 2} In early 2009, Defendant was living at 510 North Race Street in Springfield, with his girlfriend, Carla Harvey, her

child, and Harvey's ex-boyfriend, Jerry Gaskins. On the evening of January 26, 2009, at around 10:00 p.m., the Moto Mart on Bechtle Avenue in Springfield was robbed. The suspect, a white male, wore a grey hooded sweatshirt, black sunglasses, blue jeans, and a bandana that partially covered his face. The suspect, who had what appeared to be a handgun, demanded money, and after the store clerk handed over \$350 in cash, the suspect put the money into a green cloth bag and ran. Police were notified but no one was immediately apprehended.

{¶ 3} On January 27, 2009, the Rite Aid at the corner of North Plum Street and West North Street in Springfield was robbed. There were similarities to the Moto Mart robbery the night before, including the suspect's clothing and behavior. The suspect fled on foot and was tracked in the snow by a K-9 unit to the house at 510 North Race Street where Defendant and his roommates lived.

Defendant let police inside the home and gave them permission to search his room and all common areas of the house. Police obtained a warrant to search Gaskins' room, where police found a bag of money and a plastic handgun. Various items of clothing were also taken from the home. Gaskins was arrested.

{¶ 4} After viewing and comparing video surveillance footage of both the Moto Mart and Rite Aid robberies, police noted several similarities. The suspect in both robberies leaned on the counter

on his right arm, held the gun in his right hand while holding a green cloth bag in his left hand, and the clothing worn by the suspect in both robberies was similar.

{¶5} On February 5, 2009, while Carla Harvey was in jail following her arrest for allegedly engaging in acts of domestic violence against Defendant, Detective McConnell interviewed her about the Moto Mart robbery. Harvey stated that she had seen the video surveillance of that robbery and she identified Defendant as the perpetrator. Harvey said she was able to recognize Defendant's distinctive voice. The following day Defendant was arrested for the Moto Mart robbery. Defendant requested that he be given a polygraph test. A stipulated polygraph test was agreed to by the parties. The test results indicated that Defendant was deceptive in answering questions posed by the examiner.

{¶6} Defendant was indicted on two counts of robbery, one count in violation of R.C. 2911.02(A)(2), a felony of the second degree, and one count in violation of R.C. 2911.02(A)(3), a felony of the third degree.

{¶7} A jury trial commenced in May 2009. Prior to trial the court granted a motion by the state to exclude any reference to or results from a second polygraph test that Defendant took without the State's knowledge and which had not been stipulated to by either party. Gaskins testified at trial that he committed the Rite Aid

robbery and that he drove the getaway vehicle during the Moto Mart robbery, but that Defendant committed that robbery. Richard Emmons testified that the results of the stipulated polygraph test show that Defendant was being deceptive. Defendant's girlfriend, Carla Harvey, testified that she had seen the surveillance video of the Moto Mart robbery several times and that she recognized the robber as Defendant.

{¶8} Defendant testified in his own defense that he did not rob the Moto Mart, but that Gaskins did. He also claimed that Harvey lied when she testified she recognized Defendant as the robber in the surveillance video. Defendant indicated that he had no need or motive to rob a store because he was employed and had financial support from his family. When asked on cross-examination if his parents provided the funds for his attorney, Defendant replied: "That's correct. And for the second polygraph, which I passed also." The State objected and requested a mistrial. A recess was called and the court heard arguments by counsel. The trial court subsequently granted the State's request for a mistrial.

{¶9} A second trial commenced in August 2009. During this trial Defendant presented testimony that the Moto Mart robbery was similar to a robbery that occurred in Sharonville, Ohio, on January 9, 2009, which Gaskins admitted he committed and in which

similar clothing was worn by the robber, a similar green bag was used, and the robber engaged in similar behavior in leaning on the counter on his right arm. Additionally, there was evidence presented that on the night of the Moto Mart robbery, Defendant was working until 11:30 p.m., repairing a bathroom leak with his employer, George Frost. Finally, Defendant presented the testimony of a jail inmate, William Spriggs, who had been incarcerated with Gaskins. According to Spriggs, Gaskins said he framed Defendant for the Moto Mart robbery.

{¶ 10} The jury found Defendant guilty of both counts of robbery. The trial court merged the two offenses and sentenced Defendant on count one, the second degree felony, to the maximum eight year prison term.

{¶ 11} We granted Defendant leave to file a delayed appeal from his conviction and sentence.

#### FIRST ASSIGNMENT OF ERROR

{¶ 12} "THE TRIAL COURT ABUSED ITS DISCRETION IN DECLARING A MISTRIAL, AND VIOLATED APPELLANT'S RIGHT TO BE FREE FROM DOUBLE JEOPARDY."

{¶ 13} Defendant argues that the trial court abused its discretion in granting a mistrial, over his objection, when there was no manifest necessity for that and any prejudice could have been avoided by a curative instruction, and therefore his retrial

violated his double jeopardy rights. *State v. Widner* (1981), 68 Ohio St.2d 188; *Arizona v. Washington* (1978), 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717.

{¶ 14} Defendant's first jury trial commenced on May 21, 2009.

Prior to trial, the trial court granted the State's motion in limine to exclude any reference to or results of a second polygraph examination that Defendant had taken and that the parties had not agreed to or stipulated. Defendant testified in his own defense and indicated that he had no need or motive to rob the Moto Mart store because he was employed during this period of time and was receiving financial support from his family. During cross-examination of Defendant, the following occurred:

{¶ 15} "Q. Am I to understand that your parents also provided funds for your bond and for your attorney?

{¶ 16} "A. That's correct. And for the second polygraph, which I passed, also.

{¶ 17} "MR. KINSLER: Objection, Your Honor, to this testimony.

{¶ 18} "MR. FRIZZELL: I don't oppose the objection.

{¶ 19} "MR. KINSLER: Your Honor, may we approach?

{¶ 20} "THE COURT: We'll have to take a recess. Sorry." (T. 378-379).

{¶ 21} The prosecutor objected to Defendant's reference to the second polygraph exam, and the trial court conducted a hearing

out of the presence of the jury after the State requested a mistrial.

The court found that Defendant intentionally violated the court's order prohibiting any reference to the second polygraph examination and/or the results thereof, and that Defendant's statement that he passed the second polygraph was false because the examiner concluded that the second test was "inconclusive."

{¶ 22} Defendant objected to a mistrial and argued that a curative instruction to the jury to disregard Defendant's statement about the second polygraph examination would be sufficient to avoid any prejudice. The trial court considered the alternatives to a mistrial and the arguments and suggestions of counsel in that regard, but concluded that there was a manifest necessity for a mistrial. The court reasoned that Defendant's statement about the second polygraph irreparably influenced the jury and prejudiced the State by undermining the stipulated polygraph evidence the State had offered. Accordingly, the trial court granted the State's request for a mistrial. Defendant was retried before a jury a second time in August 2009.

{¶ 23} Defendant argues that his retrial violated his Double Jeopardy rights because the trial court declared a mistrial, over Defendant's objection, when there was no manifest necessity for a mistrial, and the ends of public justice would not otherwise have been defeated. An examination of this record reveals, and

Defendant's appellate counsel conceded at oral argument, that after the trial court ordered a mistrial and prior to the commencement of the second trial, Defendant never raised the double jeopardy bar, either by way of a motion to dismiss or a plea in bar and abatement. Defendant's double jeopardy claim implicates a defense based upon a defect in the institution of the second prosecution. Such claims must be timely raised before trial or they are waived. Crim.R. 12(C)(1), (H).

{¶ 24} Defendant's failure to raise a double jeopardy claim prior to the start of the second trial constitutes a "forfeiture" of that claim and his objection to the second trial. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, at ¶22-23; *State v. Head* (Sept. 20, 1985), Lake App. No. 10-258. We review such matters only for "plain error." *Payne*. Plain error does not exist unless it can be said that but for the error the outcome of the trial would clearly have been different. *State v. Long* (1978), 53 Ohio St.2d 91.

{¶ 25} We cannot say that but for Defendant's failure to timely raise his double jeopardy claim prior to the second trial the outcome of that proceeding would clearly have been different. There was no error, plain or otherwise, in the trial court's ruling that a manifest necessity for a mistrial existed in this case due to Defendant's intentional misconduct in blurting out that he

passed a second polygraph, which prejudiced the State by undermining the stipulated polygraph evidence and put before the jury evidence the court had previously ruled was inadmissible.

{¶ 26} Defendant's first assignment of error is overruled.

#### SECOND ASSIGNMENT OF ERROR

{¶ 27} "COUNSEL WAS INEFFECTIVE BY FAILING TO INTERVIEW A MATERIAL WITNESS PRIOR TO TRIAL, AND FAILING TO REQUEST AN INSTRUCTION ON A LESSER INCLUDED OFFENSE, DEPRIVING APPELLANT OF A FAIR TRIAL AND HIS SIXTH AMENDMENT RIGHT."

{¶ 28} Defendant argues that he was deprived of the effective assistance of counsel at trial because counsel failed to interview a defense witness who provided unexpected alibi testimony for Defendant when no notice of such a defense had been filed, and because counsel failed to request an instruction on the lesser included offense of theft.

{¶ 29} In order to demonstrate ineffective assistance of trial counsel, Defendant must demonstrate that counsel's performance was deficient and fell below an objective standard of reasonable representation, and that Defendant was prejudiced by counsel's performance; that there is a reasonable probability that but for counsel's unprofessional errors, the result of Defendant's trial or proceeding would have been different. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v.*

*Bradley* (1989), 42 Ohio St.3d 136.

{¶ 30} George Frost testified for Defendant. Frost testified that he employed Defendant working on rental properties Frost owns. Defendant offered that evidence to show that he had no need for money and, therefore, no motive to commit the robbery at the Moto Mart. In the course of his testimony, Frost stated that on January 29, 2006, he kept Defendant working with him on a job until 11:30 p.m. or 12:00 midnight. The robbery occurred at about 10:00 p.m. on that evening.

{¶ 31} Defendant argues that his trial counsel was ineffective for having failed to interview Frost, suggesting that Defendant could then have presented an alibi defense based on Frost's testimony. Defendant infers that counsel necessarily failed to interview Frost from the fact that counsel told the court he was surprised by Frost's testimony that Defendant was with Frost when the robbery of the Moto Mart took place. Defendant complains that Frost's assertion allowed the State to impeach Frost with evidence of Defendant's own testimony at the first trial that he was home by 10:00 p.m. or 11:00 p.m. on the night of the robbery.

{¶ 32} The fact that counsel was surprised by Frost's testimony does not demonstrate that counsel necessarily failed to interview Frost. It only demonstrates that counsel was surprised by Frost's assertion.

{¶ 33} When a defendant proposes to offer testimony at trial to establish an alibi on his behalf, the defendant must serve written notice of his intent on the prosecutor at least seven days prior to trial. Crim.R. 12.1. If Crim.R. 12.1 is violated, the trial court may exclude evidence of the alibi unless the court determines that the evidence should be admitted "in the interest of justice." *Id.*

{¶ 34} The court did not order the jury to disregard Frost's testimony concerning Defendant's whereabouts on the evening of the robbery, probably because the court believed defense counsel was surprised by the assertion and could not have provided prior notice. Defendant was not prejudiced by that turn of events. Neither was he prejudiced by introduction of Defendant's prior trial testimony rebutting Frost's assertion, which is a form of admission not barred by the rule against hearsay. Such evidence was admissible to rebut Frost's testimony, whether or not counsel had learned of it and filed a notice of alibi.

{¶ 35} Finally, Defendant suggests that his attorney's failure to learn what Frost would say prevented counsel from investigating the matter further in order to develop an alibi defense. However, the record fails to reflect what those developments might be. Absent that showing, prejudice is not shown for purposes of *Strickland*.

{¶ 36} Defendant additionally argues that his counsel performed deficiently by failing to request a jury instruction on the lesser included offense of theft.

{¶ 37} The decision whether to give a requested jury instruction is a matter left to the sound discretion of the trial court, and its decision will not be disturbed on appeal absent an abuse of discretion. *State v. Davis*, Montgomery App. No. 21904, 2007-Ohio-6680, at ¶14. “‘Abuse of discretion’ has been defined as an attitude that is unreasonable, arbitrary or unconscionable. *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, 87, 19 OBR 123, 126, 482 N.E.2d 1248, 1252. It is to be expected that most instances of abuse of discretion will result in decisions that are simply unreasonable, rather than decisions that are unconscionable or arbitrary.

{¶ 38} “A decision is unreasonable if there is no sound reasoning process that would support that decision. It is not enough that the reviewing court, were it deciding the issue *de novo*, would not have found that reasoning process to be persuasive, perhaps in view of countervailing reasoning processes that would support a contrary result.” *AAAA Enterprises, Inc. v. River Place Community Redevelopment* (1990), 50 Ohio St.3d 157, 161.

{¶ 39} A trial court must fully and completely give all instructions relevant and necessary for the jury to weigh the

evidence and discharge its duty as the fact-finder. *State v. Comen* (1990), 50 Ohio St.3d, 206. If under any reasonable view of the evidence it is possible to find the defendant not guilty of a greater offense with which he is charged and guilty of a lesser offense, the instruction on the lesser offense must be given. *State v. Wengatz* (1984), 14 Ohio App.3d 316. Where the evidence in a criminal case would support a finding by the jury of guilty of a lesser offense included in the greater offense for which the Defendant was tried, it is prejudicial error for the trial court to refuse a defense request to instruct on the lesser offense. *State v. Parra* (1980), 61 Ohio St.2d 236.

{¶ 40} R.C. 2913.02(A) defines the offense of theft, and provides that no person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over the property or services by threat or intimidation. Defendant was charged with robbery in violation of R.C. 2911.02(A)(2), which provides that no person in committing a theft offense shall inflict or threaten to inflict physical harm on another. Defendant would be entitled to an instruction on theft as a lesser included offense of robbery if under any reasonable view of the evidence the jury could possibly find that he did not inflict or threaten to inflict physical harm on the victim or victims of the theft he allegedly committed.

{¶ 41} The Moto Mart store clerk, Megan Henry, recalled Defendant telling her to give him the money, including the big bills from underneath the drawer, and nobody would get hurt. That is an implicit threat of harm, and Henry believed that if she failed to comply she would be hurt. The other store clerk, Cindy Bowen, observed the gun used during the robbery when Defendant placed it on the counter. Defendant's brandishing of the weapon constitutes a threat of physical harm and/or the use or a threat to use force. Under these facts and circumstances, the jury could not reasonably have found Defendant guilty of theft but not guilty of robbery. An instruction on theft was not warranted by the evidence and Defendant's counsel did not perform deficiently by failing to request that instruction. Ineffective assistance of counsel has not been demonstrated.

{¶ 42} Defendant's second assignment of error is overruled.

THIRD ASSIGNMENT OF ERROR

{¶ 43} "APPELLANT CONTENDS HIS CONVICTION FOR ROBBERY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND THE JURY CLEARLY LOST ITS WAY."

{¶ 44} Defendant argues that his conviction for robbery is not supported by legally sufficient evidence and is against the manifest weight of the evidence.

{¶ 45} A sufficiency of the evidence argument challenges

whether the State has presented evidence on each element of the offense alleged to allow the case to go to the jury or sustain the verdict as a matter of law. *State v. Thompkins* (1997), 78 Ohio St.3d 380. The proper test to apply to such an inquiry is the one set forth in paragraph two of the syllabus of *State v. Jenks* (1991), 61 Ohio St.3d 259:

{¶ 46} "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. 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."

{¶ 47} Defendant was found guilty of robbery in violation of R.C. 2911.02(A)(2) and (A)(3), which provide respectively:

{¶ 48} "(A) No person in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following:

{¶ 49} "\* \* \*

{¶ 50} "(2) Inflict, attempt to inflict, or threaten to inflict physical harm on another;

{¶ 51} “(3) Use or threaten the immediate use of force against another.”

{¶ 52} Defendant argues that because of the similarities between the Moto Mart robbery and the robbery of the Rite Aid and an earlier robbery in Sharonville, Ohio, the latter two committed by Gaskins, the evidence was insufficient to demonstrate that Defendant was the perpetrator of the Moto Mart robbery, particularly given that the store clerks could not identify Defendant as the robber. We disagree.

{¶ 53} Both Gaskins and Harvey identified Defendant as the perpetrator of the Moto Mart robbery. Gaskins said he drove Defendant to the Moto Mart in order to perform the robbery. Harvey, Defendant’s girlfriend and housemate, identified Defendant as the perpetrator from the video recording of the robbery made by store security cameras. Detective DeWine, who interviewed both Defendant and Gaskins, also testified that it was Defendant who was depicted in the Moto Mart surveillance video.

{¶ 54} The credibility of the witnesses was for the jury to decide. *State v. DeHass* (1967), 10 Ohio St.2d 230. Furthermore, the jurors were able to view the video surveillance of the Moto Mart robbery and the similar robberies at the Rite Aid and Sharonville locations that Gaskins committed, and compare Gaskins’ voice and walk with the robber shown at Moto Mart. Finally, the

polygraph operator testified that Defendant was deceptive during his stipulated polygraph about the Moto Mart robbery. Viewed in a light most favorable to the State, this evidence was sufficient to prove that Defendant was the perpetrator of the Moto Mart robbery.

{¶ 55} Defendant further argues that the evidence was insufficient to prove that he either threatened to inflict physical harm or used or threatened the use of force. In resolving the previous assignment of error we discussed this issue and concluded that the evidence presented was sufficient to prove that Defendant threatened harm and/or used or threatened the use of force by his statements and by brandishing the gun during the robbery. Viewing the evidence in this case in a light most favorable to the State, as we must, a rational trier of facts could find all of the essential elements of robbery under R.C. 2911.02(A)(2) and (A)(3) proven beyond a reasonable doubt. Defendant's conviction is supported by legally sufficient evidence.

{¶ 56} A weight of the evidence argument challenges the believability of the evidence and asks which of the competing inferences suggested by the evidence is more believable or persuasive. *State v. Hufnagle* (Sept. 6, 1996), Montgomery App. No. 15563. The proper test to apply to that inquiry is the one set forth in *State v. Martin* (1983), 20 Ohio App.3d 172, 175:

{¶ 57} “[t]he 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 lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.”

{¶ 58} The credibility of the witnesses and the weight to be given to their testimony are matters for the trier of facts to resolve. *State v. DeHass* (1967), 10 Ohio St.2d 230. In *State v. Lawson* (Aug. 22, 1997), Montgomery App. No. 16288, we observed:

{¶ 59} “Because the factfinder ... has the opportunity to see and hear the witnesses, the cautious exercise of the discretionary power of a court of appeals to find that a judgment is against the manifest weight of the evidence requires that substantial deference be extended to the factfinder's determinations of credibility. The decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness.”

{¶ 60} This court will not substitute its judgment for that of the trier of facts on the issue of witness credibility unless it is patently apparent that the trier of facts lost its way in arriving at its verdict. *State v. Bradley* (Oct. 24, 1997), Champaign App. No. 97-CA-03.

{¶ 61} The credibility of the witnesses and the weight to be given to their testimony were matters for the trier of facts, the jury here, to decide. *DeHass*. The jury did not lose its way simply because it chose to believe the State's witnesses, rather than Defendant's, which it had a right to do. Reviewing this record as a whole, we cannot say that the evidence weighs heavily against a conviction, that the trier of facts lost its way in choosing to believe the State's witnesses, or that a manifest miscarriage of justice has occurred. Defendant's conviction is not against the manifest weight of the evidence.

{¶ 62} Defendant's third assignment of error is overruled.

FOURTH ASSIGNMENT OF ERROR

{¶ 63} "THE TRIAL COURT ABUSED ITS DISCRETION IN EXCLUDING RELEVANT EVIDENCE FROM ADMISSION AT TRIAL, DEPRIVING APPELLANT OF A FAIR TRIAL."

{¶ 64} Defendant argues that the trial court abused its discretion by excluding relevant, admissible evidence. The admission or exclusion of evidence rests within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. *State v. Sage* (1987), 31 Ohio St.3d 173.

{¶ 65} The parties entered into a stipulated polygraph agreement that provided the polygraph examiner could testify

regarding "all aspects of the polygraph examination." The trial court granted the State's pretrial motion in limine to limit the testimony of the polygraph examiner to matters regarding the administration of the polygraph test and the interpretation and results thereof, excluding the examiner's impression that Defendant had been truthful during his pretest interview/questioning, and that the exam therefore presented a "conundrum."

{¶ 66} Richard Emmons, the polygraph examiner, testified at both the first and second trials that a polygraph examination consists of much more than simply asking questions while the examinee is attached to the machine and then analyzing the machine's readout (charts/graphs) of the examinee's response. At the first trial, Emmons testified that a polygraph examination begins when the examinee first comes into his office and ends when an opinion is rendered. Emmons assesses the truthfulness or deceptiveness of the examinee all during this period of time. At the second trial Emmons testified that during the pretest he asks various questions of the examinee, looking for various responses in body language. Emmons takes those things into account in forming his opinion. According to Emmons, observations plus the polygraph charts are the basis for his opinion.

{¶ 67} During the first trial, defense counsel attempted to

ask Emmons on cross-examination whether, based on his analysis of the entire polygraph examination that began when Defendant first came into his office, his opinion regarding Defendant's truthfulness or lack thereof remained consistent throughout. The State objected and the trial court sustained that objection. Defendant subsequently proffered that Emmons' opinion of the veracity of Defendant changed through the course of the polygraph examination process, that Emmons' opinion is based upon and affected by more than the actual administration of the machine test alone, and that after the examination was completed Emmons remarked that the examination was a conundrum.

{¶ 68} The parties agreed that what had happened was that Defendant's statements during an early portion of the polygraph examination process, before actual administration of the test, caused Emmons to believe that Defendant was being truthful. However, when Emmons analyzed the charts and graphs the test produced he found them inconsistent with what he earlier believed, and Emmons ultimately opined that Defendant was lying on the pertinent questions about the Moto Mart robbery. Defendant indicated that he wanted to offer evidence that Emmons' opinion had changed during the polygraph examination. The trial court recalled Emmons to the stand and asked him if there was anything about the examination, either before, during or after, that would

cause him to reconsider his opinion. Emmons answered "no." The trial court refused to admit Defendant's proffered statements by Emmons.

{¶ 69} During the second trial, Defendant's counsel asked Emmons during cross-examination whether after the examination concluded he commented that the examination was a conundrum. The State objected and the trial court sustained that objection, ruling that it would not allow any comment by Emmons about the accuracy of the test. Defendant argues that the trial court abused its discretion in refusing to allow evidence that during the course of the polygraph examination Emmons changed his opinion about Defendant's truthfulness, which resulted in his reference to the test as a conundrum.

{¶ 70} Evid.R. 702(C) permits a witness to testify as an expert concerning a matter of opinion if "[t]he witness' testimony is based on reliable scientific, technical, or other specialized information." Emmons' comment that the test results presented a "conundrum," which is "question or problem as to which only a conjectural answer can be made," Webster's Third New International Dictionary, relates to the reliability of the technical results of the polygraph test on which Emmons based his opinion. All relevant evidence is admissible unless otherwise subject to exclusion. Evid.R. 402. Polygraph evidence is admissible when

the parties so stipulate. *State v. Souel* (1978), 53 Ohio St.2d 123. If the graphs and the polygraph examiner's opinion are offered in evidence, as they were here, the defendant has a right to cross-examine the examiner respecting, "at the discretion of the trial judge, any other matter deemed pertinent to the inquiry."

*Id.*, at paragraph three of the syllabus.

{¶ 71} The parties stipulated that the examiner could testify concerning "all aspects of the polygraph examination." Emmons testified that he takes his pretest questions/interview into account in forming his opinion. Being an aspect of the opinion which Emmons formed and which was offered in evidence through his testimony, Defendant was entitled to cross-examine Emmons by inquiring of him why he called the test results a conundrum, at least in relation to the pretest questions/interview of Defendant that Emmons performed. The trial court abused its discretion when it prevented Defendant from making those inquiries.

{¶ 72} Defendant additionally argues that the trial court abused its discretion by excluding evidence that Harvey's domestic violence charges were dismissed prior to her testimony against Defendant, which could demonstrate Harvey's bias and motive for testifying as she did against Defendant. Evidence which demonstrates a witness' bias, prejudice, interest, or motive to misrepresent is relevant and admissible to impeach the witness.

Evid.R. 616; *State v. Carlton* (Nov. 22, 1995), Montgomery App. No. 14930; *Weiner v. Kwiat*, Montgomery App. No. 19289, 2003-Ohio-3409.

{¶ 73} Prior to her arrest for domestic violence acts against Defendant, Harvey told Defendant's counsel that the person depicted in the Moto Mart surveillance video was not Defendant but was Jerry Gaskins, their roommate. Harvey later said that she said that because Defendant told her to do so and she was afraid. After Harvey was arrested and while she was in jail on the domestic violence charges, police interviewed Harvey about the domestic violence incident and the Moto Mart robbery. Harvey told Detective McConnell that Defendant was the person in the Moto Mart surveillance video and that she recognized his distinctive voice. Defendant was arrested for the Moto Mart robbery the next day.

{¶ 74} At Defendant's second trial, Harvey and several police officers including McConnell, DeWine, and Flores all testified that Harvey was not promised anything in exchange for her testimony and that there was no agreement to dismiss Harvey's domestic violence charges in exchange for her testimony against Defendant.

During cross examination of Sergeant Flores, when Defendant attempted to ask him if he was aware that Harvey's domestic violence charges had been dismissed on February 17, 2009, the trial court sustained the prosecutor's objection to that question.

{¶ 75} Defendant was entitled to show that Harvey's domestic violence charges had been dismissed, for whatever impeachment value that evidence may have had in showing Harvey's bias, interest, prejudice, or motive for testifying in this case. An examination of this record fails to disclose that any other witness testified that Harvey's domestic violence charges were dismissed. We note that the prosecutor during his closing argument conceded that Harvey has bias issues, and that "in Gaskins' and Harvey's case let's just concede that there is bias." Regarding Harvey, Defendant was nevertheless entitled to introduce evidence exemplifying Harvey's motive for changing her story and testifying against Defendant, in his view.

{¶ 76} The fourth assignment of error is sustained.

FIFTH ASSIGNMENT OF ERROR

{¶ 77} "THE MULTIPLE ERRORS COMMITTED BY THE TRIAL COURT, TAKEN TOGETHER, DEPRIVED APPELLANT OF A FAIR TRIAL."

{¶ 78} Defendant argues that the cumulative effect of the errors during the trial deprived him of a fair trial. *State v. DeMarco* (1987), 31 Ohio St.3d 191. We have found that the trial court erred when it limited Defendant's cross-examination of the polygraph operator, Emmons, and when it excluded evidence Defendant wished to offer to show Harvey's alleged motive to untruthfully implicate Defendant in the Moto Mart robbery. We might not have found that

either error, standing alone, violated Defendant's substantial rights. In that event, error may be disregarded. Crim.R. 52(A).

However, taken together, we find that those two instances combined to deny Defendant's Sixth Amendment right to a fair trial, which includes the right to present relevant evidence in his own defense.

"[B]efore a federal constitutional error can be held harmless, the [reviewing] court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California* (1967), 386 U.S. 18, 24, 17 L.Ed.2d 705, 710-711, 87 S.Ct. 824.

We are unable to make that declaration regarding the combined effect of the two errors involved.

{¶ 79} The fifth assignment of error is sustained.

#### Conclusion

{¶ 80} Having sustained the Fourth and Fifth Assignments of Error, we will order Defendant's conviction reversed and the case remanded for a new trial.

BROGAN, J. And FAIN, J., concur.

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