

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals Nos. L-08-1208
L-09-1214

Appellee

Trial Court No. CR 07-3684

v.

Stoney Lee Thompson

DECISION AND JUDGMENT

Appellant

Decided: September 30, 2011

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
David F. Cooper, Assistant Prosecuting Attorney, for appellee.

Deborah Kovac Rump, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellant, Stoney Thompson, appeals his convictions on three counts of complicity in the commission of aggravated murder, violations of R.C. 2923.03(A)(2) and 2903.01(A) and (F), after a jury trial in the Lucas County Court of Common Pleas. The convictions arise out of the killings of Kenneth Nicholson, Todd Archambeau, and

Michael York on October 24, 2006, at 410 Ohio Street in Toledo, Lucas County, Ohio.

In a judgment filed on June 27, 2008, the trial court sentenced appellant to imprisonment for life without parole on each count.

{¶ 2} Subsequently appellant filed a motion for a new trial, which the trial court denied in an August 3, 2009 judgment. Appellant also appeals that judgment. We have consolidated the appeals for proceedings in this court. Appellant asserts eleven assignments of error on appeal:

{¶ 3} "Assignment of Error I: The state violated Thompson's right to due process under the United States and Ohio Constitutions because it withheld evidence that was favorable to Thompson despite repeated requests for discovery.

{¶ 4} "Assignment of Error II: The trial court abused its discretion by denying Thompson's motion for a new trial.

{¶ 5} "Assignment of Error III: Thompson's right to due process and trial by a fair and impartial jury as guaranteed by the United States Constitution and the Ohio Constitution was violated by the jury taking notes, the questions they were permitted to ask, and the jurors talking with each other about the trial as it was progressing.

{¶ 6} "Assignment of Error IV: As evidenced by the jury verdict and other evidence, Thompson's convictions were against the manifest weight of the evidence.

{¶ 7} "Assignment of Error V: Thompson's convictions were legally insufficient in violation of his right to due process. The state failed to prove 'complicity,' 'prior calculation and design,' and that he acted 'purposely.'

{¶ 8} "Assignment of Error VI: Thompson's right to due process and fair trial, including his federal constitutional right to confront witnesses, was violated by the state's needless certification of witnesses, untimely production of discovery, and likely not producing discoverable materials. And the trial court erred by not using another judge to evaluate the certification issues.

{¶ 9} "Assignment of Error VII: Thompson's right to effective assistance of counsel and a fair trial were violated when the trial court did not stop the trial to allow him an opportunity to thoroughly review the discovery and prepare effective cross-examination.

{¶ 10} "Assignment of Error VIII: The prosecutors and police engaged in misconduct by violating a court order relative to Thompson's motion in limine, and otherwise violating his rights to a fair trial as contemplated by the United States and Ohio Constitutions.

{¶ 11} "Assignment of Error IX: The trial court violated Thompson's rights under the United States and Ohio Constitutions through various rulings related to evidentiary matters, jury matters, and the ability of Thompson's counsel to fairly represent Thompson."

{¶ 12} "Assignment of Error No. X: Thompson's constitutional right to effective assistance of counsel pursuant to the 6th Amendment to the United States Constitution and Article I, Sec. 10 and 16 of the Ohio State Constitution was violated.

{¶ 13} "Assignment of Error No. XI: The trial court erred in imposing three consecutive sentences of life without parole; particularly given the trial court did not have the benefit of all the available information. And, Thompson was sentenced prior to his brother's acquittal as the principal offender."

{¶ 14} Kenneth Nicholson, Todd Archambeau, and Michael York were murdered at a house located at 410 Ohio Street in Toledo, Ohio. It is undisputed that the killings occurred at 4:10-4:15 a.m. on the morning of October 24, 2006. The evidence at trial did not include any eyewitness testimony to the killings. Two witnesses placed appellant in close proximity to the killings both in time and place. They were John Kuch and Rosetta Perry.

{¶ 15} In Assignments of Error Nos. I and II, appellant asserts that the trial court erred when it denied appellant's motion for a new trial. The motion is rooted in the failure of the state to provide appellant with copies of audio-visual recordings of statements to police made by John Kuch. Because of the failure, appellant was unable to use the recorded statements to cross-examine Kuch at trial. The recordings are of interviews by police conducted on May 16 and 23, 2007.

{¶ 16} Under Assignment of Error No. I, appellant claims the failure to produce the recordings violated his right to due process of law under *Brady v. Maryland* (1963), 373 U.S. 83. Under Assignment of Error No. II, appellant argues that the trial court abused its discretion by failing to grant a new trial on the basis that the recordings constituted newly discovered evidence under Crim.R. 33.

{¶ 17} At the time of the killings, appellant lived in an apartment at 407 Columbus Street. The apartment is a short distance from the house at 410 Ohio Street. They are separated by a small field.

{¶ 18} Rosetta Perry testified that she used cocaine regularly during 2006 and went to 410 Ohio Street every day for drugs. Perry knew appellant well because she used to buy drugs from him and would see him at 410 Ohio Street. Perry also testified that she knew the murder victims, Todd Archambeau, Kenneth Nicholson, and Michael York and that she spent the night of the murders with them at 410 Ohio Street partying, smoking crack cocaine, and drinking alcohol.

{¶ 19} Perry testified that during that night, York spoke to Archambeau and Nicholson about stealing drugs and money from appellant. York told them he knew where appellant kept his cash and drugs at appellant's Columbus Street apartment. Perry also testified that she recalled the three leaving 410 Ohio Street for about half an hour during the night and then returning with about \$10,000 in cash and 2 to 3 ounces of crack cocaine.

{¶ 20} According to Perry, she and the others smoked much, but not all, of the crack cocaine and she left the house at about 3:00 to 3:30 a.m. Perry testified she saw appellant and two black men walking towards 410 Ohio Street as she walked to her apartment. At the time they were in the middle of the field that separated the house on Ohio Street and appellant's apartment on Columbus. According to Perry, she became

"scared," upon seeing the three men, did go home, but then immediately went to a friend's residence further down Chase Street.

{¶ 21} John Kuch testified that he went to appellant's apartment located at 407 Columbus Street at approximately 4:00 a.m. on October 24, 2006, to buy drugs. He stated that he arrived by car and heard a gunshot as he exited the vehicle and closed the car door. According to Kuch, he heard another gunshot as he knocked at the back door to the apartment. According to Kuch, he was unconcerned upon hearing gunshots in the neighborhood and knocked repeatedly at the door to the apartment. Kuch testified that he waited a few minutes, without anyone responding to the door.

{¶ 22} As he walked back to the car afterwards, Kuch heard appellant and Goldy Thompson (appellant's brother) run up from behind the house. According to Kuch, he saw that they ran from the direction of Ohio Street. The evidence at trial was that Ohio runs parallel to Columbus and is the first street located in the direction to the rear of the apartment. Kuch testified that he asked if they had any cocaine and was told they would get with him later.

{¶ 23} According to Kuch, appellant ran up to a white Oldsmobile car, threw something, heavy and wrapped in a brown paper bag, into the trunk. Kuch testified that appellant proceeded to start the vehicle and Goldy Thompson went to his red pickup truck and could not start it.

{¶ 24} Kuch also testified Goldy requested help starting the pickup and, while assisting Goldy, Kuch saw that the left side of Goldy's face appeared wet. According to

Kuch, appellant told Goldy: "Get that shit off your face." Goldy grabbed a rag from the truck and wiped off his face.

{¶ 25} Kuch testified that he gave Goldy a ride to the corner of Erie and Lapier and that, while on the way, Goldy told him: "You didn't see me tonight."

{¶ 26} According to Kuch, he sold various caliber guns to appellant in the past, including a .25 caliber gun.

Kuch DVD Recordings

{¶ 27} Under the version of Crim.R. 16 in effect at the time of trial, trial courts conducted in-camera inspections at trial of a witness's prior written or recorded statements to determine whether inconsistencies existed between them and the witness's testimony upon direct examination at trial. If the trial court determined inconsistencies existed, the court was to give a copy of the statement to defense counsel "for use in cross-examination of the witness as to the inconsistencies." Crim.R. 16(B)(1)(g).

{¶ 28} Here the state provided the defense with summaries of statements made by Kuch on May 16 and 23, 2007, but did not disclose the existence of the DVD recordings of the statements or provide copies of the recordings to either the trial court for in-camera review or to defense counsel for use in cross-examination of Kuch at trial. After Kuch testified on direct, the trial court ordered the state to provide the defense copies of all statements by Kuch to police. It is undisputed that the state violated Crim.R.16(B)(1)(g) by failing to disclose the existence of the recordings, failing to submit them for court

examination under the rule, and in failing to provide appellant with copies of the recordings pursuant to the trial court's order.

{¶ 29} "The suppression by the prosecution of evidence favorable to an accused 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. (*Brady v. Maryland* [1963], 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215, followed.)" *State v. Johnston* (1988), 39 Ohio St.3d 48, paragraph four of the syllabus. Both impeachment and exculpatory evidence come within the *Brady* rule. *United States v. Bagley* (1985), 473 U.S.667, 676; *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, ¶ 338.

{¶ 30} For purposes of *Brady v. Maryland* analysis, evidence is "deemed material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Johnston*, at paragraph five of the syllabus, following *United States v. Bagley*.

Claimed Inconsistencies

{¶ 31} In the motion for a new trial, appellant argued there were two inconsistencies between Kuch's trial testimony and his recorded statement of May 16, 2007. The first inconsistency concerned the time of Kuch's claimed contact with appellant and Goldy Thompson that night. The second was the direction from which Kuch claimed he saw appellant and Goldy Thompson approach appellant's Columbus Street apartment.

{¶ 32} The May 16, 2007 recorded statement disclosed that Kuch first told police that he saw appellant and his brother running to the apartment at 12:30-1:00 a.m. The police detective told appellant that "the times don't jibe." At trial Kuch testified that the event occurred after 4:00 a.m. The May 16, 2007 statement summary did not identify the stated time of the claimed event.

{¶ 33} With respect to direction, Kuch testified at trial to hearing and seeing appellant and his brother approach the house from the rear, running down the alley from the direction of Ohio Street. Appellant argues that the May 16, 2007 recorded statement shows that Kuch "provided a variety of versions from they were running -- down the alley, running from the back of 410 Ohio, running around 410 Ohio, running down the sidewalk on Erie, on Michigan or Ontario, and couldn't really remember."

{¶ 34} The trial court concluded that Kuch's testimony as to time was clearly different from his trial testimony but that his testimony as to direction did not completely conflict with the May 16, 2007 recorded statement. The trial court denied the motion for a new trial on *Brady* grounds based upon a conclusion that suppressed evidence was not material; that is, did not affect the outcome of trial.

{¶ 35} We agree that upon review of the record as a whole that it is not reasonably probable that the outcome of trial would have been different had the evidence been disclosed and copies of the recorded statements been provided to appellant for use in cross-examination of Kuch at trial. Kuch's testimony was not the only evidence establishing appellant's proximity in time and place to the murders. Rosetta Perry

testified that she saw appellant approach the house on Ohio Street shortly before the killings. There was evidence at trial that appellant admitted that he played a part in the murders. There was also other evidence tying appellant to the murders, including evidence of motive for the crimes.

{¶ 36} Tivita Pierce and Kenya Sharp testified at trial. Both testified to longstanding personal relationships with appellant. Pierce is the mother of appellant's three sons, ages 9 through 12. Kenya Sharp was appellant's girlfriend and mother of appellant's two daughters, ages 3 and 12. Despite appellant's relationship with Sharp, appellant maintained contact with his sons and Pierce would see appellant "a couple of times a week."

{¶ 37} Both women testified that appellant instructed them to lie to police as to his whereabouts on the night of the killings. Both testified that appellant instructed them to tell police that Kenya Sharp dropped appellant off at Tivita Pierce's residence that night.

Tivita Pierce testified at trial that she was not with appellant on the night of the killings. Kenya Sharp testified that appellant left her residence at approximately 10-10:30 p.m. on the night of October 23, 2006, and that she did not have contact with appellant until 6:15 to 6:30 a.m. the following morning. At that time, according to Sharp, appellant telephoned and told Sharp that he ran out of gas and requested that Sharp bring gas to him at the Columbus Street apartment.

{¶ 38} Sharp testified that she complied and that when she arrived at the Columbus Street address, appellant loaded two large plastic trash bags into the back seat

of her car and told her to take the bags to her Regina Manor apartment. According to Sharp, appellant told her the bags contained dirty laundry.

{¶ 39} Sharp testified that she returned to her apartment alone and unloaded the bags. According to Sharp, the bags were heavy and she never looked inside. She returned to the Columbus Street apartment, picked up appellant and their daughters, and returned with them to her apartment.

{¶ 40} Sharp testified that later that morning, as she was on the second floor of her apartment getting her older daughter ready for school, she saw Goldy Thompson approach her apartment and heard the apartment door open and close. Afterwards the bags were gone.

{¶ 41} The state argued at trial that the two bags removed from the Columbus Street apartment on the morning after the murders contained bloody shoes and clothing worn during the killings. The crime scene was very bloody. Investigating police officers testified that it was very difficult to avoid getting blood on their clothing and shoes from contact with surfaces in the house after the murders. An expert in blood spatter analysis testified as to how blood also became airborne during the course of the murders due to the nature of the killings.

{¶ 42} Lynette Avery testified that she knew appellant and questioned him concerning the murders in July 2007. She testified that she directly asked appellant "did he do it?" According to Avery, appellant responded "whatever happens, I'm not going down by myself."

{¶ 43} William Robasser and appellant were inmates in the Lucas County Jail at the same time for a short period in January 2008. According to Robasser, at that time appellant volunteered information about an incident, stating "some people had got their throats slit and had been shot and one person had been bashed over the head with a brick." Robasser testified that appellant admitted that he "played a part" in the murders "but didn't believe that they had evidence to convict him."

{¶ 44} Additionally, there was evidence at trial from the coroner and technicians established that bullets recovered from the three victims and shell casings recovered at the scene were all fired from the same .25 caliber semi-automatic gun. Roger Barnett testified that he observed a .22 or .25 caliber semi-automatic pistol in the door panel of appellant's truck in August or September 2006. Daniel Ruffing testified that he was present at appellant's apartment on the night before the murders and saw a semi-automatic pistol in appellant's bedroom.

{¶ 45} The trial court concluded that Kuch's credibility had already been "seriously damaged, if not destroyed," at trial. The defense aggressively cross-examined Kuch at trial based upon an inconsistency between Kuch's trial testimony and a statement attributed to him in an affidavit for a search warrant by Detective Dan Navarre.

According to the Navarre affidavit, Kuch told police investigators on May 23, 2007, that he was flagged down by Goldy Thompson at approximately 4:33 a.m. while driving a car and that Goldy Thompson had blood on him. The defense cross-examined Kuch at trial on the fact that the affidavit made no reference to appellant or of Kuch's

claimed contact with appellant and Goldy Thompson outside appellant's apartment on the morning of the murders. At trial, Kuch denied he was flagged down by anyone or that he ever told police he had been flagged down.

{¶ 46} Kuch also testified wearing a brown jumpsuit and restrained by leg chains, handcuffs and belly chain. He testified that he was serving a 24 month sentence in the Allen County Correctional Institution for felonious assault. He also admitted to prior misdemeanor convictions for theft offenses. He testified to an agreement, approved by the court in his criminal case, that he would be released early from prison (8 months early) for testifying against appellant.

{¶ 47} Appellant argues that testimony by Sue Adams and Kenneth Geno demonstrated that others committed the killings. Adams and Geno testified to seeing two men, one white and one black, leaving the house at 410 Ohio Street shortly after they heard gunshots in the residence on the morning of the murders. Adams identified Goldy Thompson as the black man she saw, not appellant. The state argues that the testimony is not decisive as neither Adams nor Geno testified that there were no others in the house.

{¶ 48} For *Brady v. Maryland* purposes, evidence is material only if there is a reasonable probability that the outcome would have been different had the evidence been disclosed. We agree with the trial court that the value of Kuch's testimony was severely diminished at trial due to a strong cross-examination by the defense, Kuch's criminal record, and promises made by the state to secure his testimony at trial.

{¶ 49} Given the strong cross-examination of Kuch at trial, independent testimony from Rosetta Perry as to appellant's proximity in time and place to the murders, evidence of appellant's conduct and admissions after the murders, and evidence of motive due to the theft of cash and drugs that night, we conclude that it is not reasonably probable that the outcome of trial would have been different had copies of the May 16 and 23, 2007 recordings been provided to the defense for use in cross-examination of Kuch at trial. We find appellant's Assignment of Error No. I is not well-taken.

Motion for New Trial Based Upon Newly Discovered Evidence

{¶ 50} Under Assignment of Error No. II, appellant argues trial court error due to the failure to grant his Crim.R. 33 motion for a new trial based upon newly discovered evidence. Under the assignment of error, appellant first argues that it was error to assign consideration of the motion for a new trial to another judge, other than the judge who presided at trial. The record reflects that a certificate of assignment was filed with the trial court on October 21, 2008, certifying assignment of a second judge, Judge Stephen A. Yarbrough, to the case.

{¶ 51} Judge Yarbrough did not preside over the case at trial. At the time of the filing of the certificate of assignment, appellant's motion for a new trial was pending before the court. Appellant did not object to the validity of the assignment of a new judge in the trial court. Appellant objects now on the basis that the trial judge who presided at trial was in the best position to rule on a motion for a new trial that requires consideration of the testimony and evidence at trial.

{¶ 52} Here, the original trial judge issued an order to secure trial transcripts at state expense before the case was reassigned to another judge. The transcripts were filed with the court in November 2008, and copies provided to counsel for appellant. Judge Yarbrough conducted an evidentiary hearing on the motion for a new trial on April 20, 2009, and issued a judgment denying the motion for a new trial on July 31, 2009.

{¶ 53} This court has recognized the importance of providing trial transcripts for court consideration when a new judge is assigned to preside over a post-trial motion for a new trial. See *Reynolds v. Hazelberg* (Aug. 6, 1999), 6th Dist. No. E-98-082. In *Reynolds v. Hazelberg*, the record was devoid of any record of appointment of the new judge. We held in the case that there must be some indication that a properly assigned judge had reviewed the trial testimony and evidence. We reversed the trial court's judgment granting a new trial in the case on that basis.

{¶ 54} Here, however, there is no issue as to the validity of the appointment assigning a second judge to preside over the post-trial motion for a new trial. The record also reflects that trial transcripts had been secured and filed with the court before the court proceeded to an evidentiary hearing on the motion and prior to the court's issuing its judgment on the motion. Both appellant and the state submitted additional briefing after the trial transcripts were secured. In the additional briefs, both parties made extensive references to the trial transcripts in support of their arguments on the motion.

{¶ 55} Although the trial court's judgment did not affirmatively state that the second judge had reviewed the trial transcript and evidence at trial, the court conducted

an analysis of the evidence at trial in its judgment in its determination of whether the outcome of trial was affected by the state's failure to disclose and produce the Kuch DVDs.

{¶ 56} In our view, the record provides sufficient indication that the trial court reviewed the trial transcript and evidence to meet the concerns we raised in *Reynolds v. Hazelberg*. We conclude that appellant's claim of error based upon the assignment of another judge, other than the trial judge, to preside over the motion for a new trial is without merit.

Merits of Crim.R. 33 Motion for New Trial

{¶ 57} The Ohio Supreme Court set forth the standard for determining whether to grant a motion for a new trial on the ground of newly discovered evidence in *State v. Petro* (1947), 148 Ohio St. 505:

{¶ 58} "To warrant the granting of a motion for a new trial in a criminal case, based on the ground of newly discovered evidence, it must be shown that the new evidence (1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence. (*State v. Lopa*, 96 Ohio St. 410, 117 N.E. 319, approved and followed.)" *Id.* at syllabus.

{¶ 59} We review a trial court decision to grant or deny a motion for a new trial on the ground of newly discovered evidence under the abuse of discretion standard. *State v. Hawkins* (1993), 66 Ohio St.3d 339, 350. The term abuse of discretion "implies that the trial court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 60} Based upon our review of the evidence and our analysis under Assignment of Error No. I, we agree with the trial court that no strong probability exists that the result of trial would have been different had the recordings of the statements by John Kuch been available to the defense for use at trial. Accordingly, we find Assignment of Error No. II is not well-taken.

Sufficiency of the Evidence

{¶ 61} Under Assignment of Error No. V, appellant challenges the sufficiency of the evidence to support his convictions to complicity in the commission of aggravated murder. Appellant argues that the state failed to prove complicity, prior calculation and design, and that he acted purposely.

{¶ 62} Sufficiency of the evidence and manifest weight of the evidence are quantitatively and qualitatively different legal concepts. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. Sufficiency of the evidence is a "test of adequacy" and a question of law. *Id.* "The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential

elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

Complicity

{¶ 63} R.C.2923.03(A)(2) defines complicity. The statute mandates: "No person, acting with the kind of culpability required for the commission of an offense, shall * * * [a]id or abet another in committing the offense." For purposes of the complicity statute, "aid or abet" means "[t]o assist or facilitate the commission of a crime, or to promote its accomplishment." *State v. Johnson* (2001), 93 Ohio St.3d 240, 243, quoting Black's Law Dictionary (7 Ed.1999) 69; *State v. Cathcart*, 6th Dist. No. L-06-1225, 2008-Ohio-370, ¶ 24.

{¶ 64} In *State v. Johnson*, the Ohio Supreme Court identified the required proof to establish a conviction for complicity under R.C. 2923.03(A)(2):

{¶ 65} "To support a conviction for complicity by aiding and abetting pursuant to R.C. 2923.03(A)(2), the evidence must show that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal. Such intent may be inferred from the circumstances surrounding the crime." *Johnson*, at syllabus.

{¶ 66} Aggravated murder, as set forth in R.C. 2903.01(A), provides: "No person shall purposely, and with prior calculation and design, cause the death of another or the unlawful termination of another's pregnancy." R.C. 2903.01(F) provides: "Whoever

violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code."

{¶ 67} Construing the evidence most favorably to the state and treating William Robasser's testimony as true, appellant admitted to Robasser that he played a part in the murders. Lynette Avery testified that appellant did not deny his involvement in the murders when she directly questioned him about his involvement. Construing the evidence most favorably to the state, appellant had motive for the murders—to punish for thefts from his residence and to recover stolen property, including stolen cocaine and \$10,000 in cash. The cocaine and cash were stolen from appellant that night.

{¶ 68} Trial testimony placed appellant in close proximity to the site of the murders both in time and place. Rosetta Perry testified that she saw appellant walking towards the Ohio Street house at approximately 3:00 to 3:30 a.m. with two others. Two witnesses, a neighbor and a visitor to the Ohio Street house, established that the shootings occurred at approximately 4:10-4:15 a.m. Each victim suffered gunshot wounds and other injuries.

{¶ 69} The crime scene was very bloody. Testimony at trial included expert testimony by the coroner, deputy coroner, and an expert in blood stain pattern interpretation. Construing the evidence most favorably to the state, a reasonable juror could conclude that those who participated in the killings likely had blood on their shoes and clothing from contact with bloody surfaces or from blood that became airborne during the course of the killings.

{¶ 70} Taking the testimony of Kenya Sharp as true, a reasonable juror could also conclude that appellant requested Kenya Sharp's assistance within two and one-half hours after the murders in order to remove plastic bags containing evidence of the murders from appellant's residence (near the crime scene) to avoid discovery by nearby investigating police and to permit subsequent destruction of evidence of the crimes. Accepting the testimony of Tivita Price and Kenya Sharp as true, a jury could conclude appellant also instructed both women to lie to police as to his whereabouts on the night of the murders.

{¶ 71} Identity of the perpetrator of a crime can be proved by circumstantial evidence. *State v. Davis*, 6th Dist. No. L-00-1143, 2002-Ohio-3046, ¶ 63.

"Circumstantial evidence and direct evidence inherently possess the same probative value." *State v. Jenks*, supra, at paragraph one of the syllabus.

{¶ 72} In our view, construing the evidence most favorably to the state, the evidence at trial, both direct (admission to William Robasser) and circumstantial, was sufficient to establish that appellant assisted or facilitated in the commission of the murders of Todd Archambeau, Kenneth Nicholson, and Michael York or promoted their accomplishment.

Purposely

{¶ 73} Expert testimony as to blood spatter and testimony by the coroner and assistant coroner at trial demonstrate that the killings were undertaken in a manner designed to kill. Michael York was shot in the head from close range. The injury was

not fatal. He died from neck wounds from a large knife or sharp object that left him nearly decapitated. He had been beaten. There were no defensive wounds.

{¶ 74} Kenneth Nicholson had several injuries. He died from gunshot wounds to the head and chest. The gunshot to the head was inflicted at close range. The gunshot wound to the chest caused substantial bleeding to both the right and left lung cavities. Nicholson also suffered sharp force injury to the side of the neck. The neck wound occurred after Nicholson had lost substantial blood from other injuries. Nicholson also suffered a laceration to the top of his head.

{¶ 75} Todd Archambeau suffered gunshot wounds to the nose and back. The gunshot to the nose involved a bullet entering the right side of the nose and following a trajectory through his throat and lodging beneath the skull. The wound caused substantial bleeding from Archambeau's mouth and nose. Blood spatter analysis demonstrated that Archambeau suffered the gunshot wound to his face on the first floor and attempted to escape his attackers by taking the stairs to the second floor. There he unsuccessfully attempted to escape through a window. He died from brain injuries caused by blunt force trauma to his head. His neck was also cut.

{¶ 76} A reasonable juror clearly had sufficient evidence to conclude that the killings were purposeful.

Prior Calculation and Design

{¶ 77} Prior calculation and design is the mens rea element necessary to establish aggravated murder under R.C. 2903.01(A). *State v. Taylor* (1997), 78 Ohio St.3d 15, 18.

Prior calculation and design is shown where the evidence at trial "reveals the presence of sufficient time and opportunity for the planning of an act of homicide to constitute prior calculation, and the circumstances surrounding the homicide show a scheme designed to implement the calculated decision to kill." *State v. Robbins* (1979), 58 Ohio St.2d 74, paragraph one of the syllabus; *State v. Cotton* (1978), 56 Ohio St.2d 8, paragraph three of the syllabus; *State v. Phutseevong*, 6th Dist. No. L-03-1178, 2005-Ohio-1031, ¶ 24.

{¶ 78} There is no bright-line test to determine whether prior calculation and design exists in a given case. *Taylor* at 20. "[E]ach case turns on the particular facts and evidence presented at trial." *Id.* "Neither the degree of care nor the length of time the offender takes to ponder the crime beforehand are critical factors in themselves,' but 'momentary deliberation' is insufficient." *Id.* at 22, quoting Committee Comment to Am.Sub.H.B. No. 511, R.C. 2903.01.

{¶ 79} "[W]here the evidence presented at trial 'reveals the presence of sufficient time and opportunity for the planning of an act of homicide to constitute prior calculation, and the circumstances surrounding the homicide show a scheme designed to implement the calculated decision to kill, a finding by the trier of fact of prior calculation and design is justified.'" *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, ¶ 39, quoting *State v. Cotton*, paragraph three of the syllabus.

{¶ 80} Construing the evidence in favor of the state, the evidence at trial demonstrated that Kenneth Nicholson and appellant had strained relations even before the night of the murders. Shortly before the murders, Kenneth Nicholson assisted his

brother, James Nicholson, in negotiations resulting in the sale of an air compressor and other construction equipment to appellant. James Nicholson testified that he broke into appellant's apartment after appellant failed to pay the agreed purchase price and stole televisions and other electronic equipment from appellant when he could not find the compressor. This occurred approximately two weeks before the murders.

{¶ 81} After the break-in, appellant spoke to James Nicholson and offered to return the compressor to him if James Nicholson returned the stolen electronic equipment. James Nicholson denied knowledge of the theft.

{¶ 82} Daniel Ruffing and Kenya Sharp testified that before the murders appellant spoke about a need for revenge for the first break-in while in the presence of Michael York, Kenya Sharp, and Daniel Ruffing. Ruffing also testified that when appellant and York talked of the earlier break-in, appellant became increasingly angry as they talked, but both appellant and York became silent when Kenneth Nicholson approached.

{¶ 83} At the time of the murders, a television that was stolen from appellant in the first break-in and \$10,000 in cash and cocaine, stolen from appellant that night, were in open view on the first floor of the house. A witness saw appellant walking towards the house from a short distance away at approximately 3:00 to 3:30 a.m. Other witnesses heard gunshots in the house at 4:10 to 4:15 a.m. The state argues that the murders were not an almost instantaneous eruption of events and that after the second break-in appellant made a decision and plan to kill Nicholson, Archambeau, and York.

{¶ 84} Detective Cousino, of the Toledo Police Department Scientific Investigation Unit, testified as an expert in blood stain pattern interpretation at trial. He testified that the evidence at the scene demonstrated that Kenneth Nicholson was killed first, in the kitchen, and on the first floor.

{¶ 85} Nicholson died from a gunshot wound to the head from close range. The coroner testified that the firearm was a few inches from the skin when fired. The trajectory of the bullet was from the right forehead through the brain impacting the posterior wall of the skull. The coroner testified that the type of injury inflicted was one that ordinarily is expected to cause death rapidly.

{¶ 86} Such execution style killings have been found of themselves to demonstrate prior calculation and design. *State v. Campbell* (2000), 90 Ohio St.3d 320, 330; *State v. Marcum*, 5th Dist. No. 10-CA-0137, 2011-Ohio-3709, ¶ 55; *State v. Phutseevong*, supra at ¶ 27; *State v. Mardis* (1999), 134 Ohio App.3d 6, 19.

{¶ 87} Additionally, the theft of the cash and drugs did not occur in appellant's presence. The evidence was that the theft occurred around midnight and appellant approached the Ohio Street house with two others at 3:00 to 3:30 a.m. from the direction of his apartment. Under the facts and circumstances in this case, a jury reasonably could infer that appellant's visit to the house at 3:00 to 3:30 a.m. was not merely a social visit but one undertaken after he discovered the break-in and loss of cash and drugs.

{¶ 88} In our view, the circumstances here demonstrate that the decision to kill Nicholson was not a result of an instantaneous eruption of events. The theft of cash and

drugs did not occur in appellant's presence. A reasonable juror could conclude that appellant had at least the time of his walk from his apartment on Columbus Street to the Ohio Street house to consider the theft and his intended response. His relations with Kenneth Nicholson were already strained by the earlier break-in. The evidence at trial demonstrated that appellant had previously discussed retaliating for the first break-in.

{¶ 89} We conclude that the evidence at trial was sufficient for a reasonable juror to conclude that the killing of Kenneth Nicholson was undertaken with prior calculation and design.

{¶ 90} The evidence at trial was that Todd Archambeau was shot, pursued up the stairs as he attempted to escape through a window on the second floor, and killed on the second floor from brain injuries caused by a blow to his head. These facts demonstrate the existence of prior calculation and design in his murder.

{¶ 91} In *State v. Claytor* (1991), 61 Ohio St.3d 234, 241, the Ohio Supreme Court applied the prior calculation and design requirement where the defendant wounded his victim, "pursued the wounded man as he attempted to flee, finally killing him with a bullet in the face." The court concluded that the defendants' "acts could be viewed as going beyond the impulse of the moment to constitute prior calculation and design." *Id.* The Supreme Court described its analysis as consistent with its prior opinion in *State v. Cotton* where the killer "stalked his victim" in a similar manner. *Claytor* at 241.

{¶ 92} More recently, in *State v. Conway*, the Ohio Supreme Court, citing the *Cotton* and *Claytor* decisions, recognized that "[p]ursuit of a wounded, helpless victim * * * has been held to be evidence of prior calculation and design." *Conway*, supra, at ¶ 45.

{¶ 93} Accordingly, we conclude there was sufficient evidence of prior calculation and design in the pursuit and killing of Todd Archambeau to support the conviction.

{¶ 94} Michael York was shot once in the head from close range. He died from wounds from a cut throat from a large knife or sharp object. Michael York's body was found on the floor in the same second floor bedroom as Todd Archambeau's body, with York's legs over the top of Archambeau. York had no blood on his pants or on his shoes.

{¶ 95} Detective Cousino testified that the absence of blood on York's shoes or pants indicated that York was upstairs before Archambeau. Archambeau bled heavily as he ascended the stairs and left a substantial blood trail. The detective also testified that evidence at the scene demonstrated that Archambeau was killed before York.

{¶ 96} The manner of York's killing demonstrates prior calculation and design. The killing was execution style and was carried out in two stages—first with a gunshot wound to the head at short range and second with a knife wound to the neck. Further, the fact that York was killed after Nicholson and Archambeau was further evidence that he was killed with prior calculation and design. We conclude that there was sufficient evidence to support a finding that York was killed with prior calculation and design.

{¶ 97} Construing the evidence in favor of the state, we find there was sufficient evidence to support a conviction of appellant for complicity in the commission of

aggravated murder including proof of complicity, of prior calculation and design, and of the fact that appellant acted purposely with respect to the killings.

{¶ 98} Assignment of Error No. V is not well-taken.

Manifest Weight of the Evidence

{¶ 99} Under Assignment of Error No. IV, appellant argues that the jury verdict finding him guilty of three counts of complicity in the commission of aggravated murder is against the manifest weight of the evidence at trial. A claim that a jury verdict in a criminal case is against the manifest weight of the evidence requires an appellate court to act as a "thirteenth juror." *Thompkins*, 78 Ohio St.3d at 387. An appellate court, "reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against conviction." *Id.*, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶ 100} Appellant argues that the jury was confused and lost its way in rendering guilty verdicts on the charges of complicity in the commission of aggravated murder. Appellant argues that there was no forensic evidence tying him to the crime scene and that the evidence failed to establish that his semiautomatic gun was the one used in the killings or establish that his shoe prints were included in the bloody shoeprints found at

the scene. Appellant also argues that the jury demonstrated that it was confused in questions asked during deliberations and as demonstrated by the need for the court to remove one juror during trial for failure to follow procedure as to note taking and the court's instructions not to discuss the case with others. Appellant argues that the testimony as to the trash bags of clothing after the killings were meaningless.

{¶ 101} We recognize that there were substantial credibility issues for the jury to resolve in this case in order to return its verdict. Because of *Brady* issues we do not consider the testimony of John Kuch in reweighing the evidence.

{¶ 102} In our view there was no manifest injustice in the jury's resolution of either credibility issues or conflicts in the evidence in this case. We have reviewed the entire record including the transcript of testimony at trial and trial exhibits admitted in evidence. In our view, appellant's convictions are supported by competent and credible evidence in the record.

{¶ 103} Such evidence placed appellant in close proximity to the murders both in time and place with a clear motive to commit the crimes – theft of drugs and \$10,000 in cash from his nearby apartment earlier that night. Competent and credible evidence at trial also supported inferences that persons who participated in the killings likely had blood on their clothing from the killings and a conclusion that, less than 2 1/2 hours after the murders, appellant called Kenya Sharp for help in disposing of evidence of the crimes.

{¶ 104} Furthermore, one witness testified that appellant admitted involvement in the murders. Another testified that when questioned as to whether he killed the men appellant did not deny it.

{¶ 105} The convictions to three counts of complicity in the commission of aggravated murder are supported by substantial competent and credible evidence in the record. Accordingly, we find Assignment of Error No. IV is not well-taken.

{¶ 106} Under Assignment of Error No. III, appellant claims he was denied due process of law under the United States and Ohio Constitutions because of jury note taking, jury submission of written questions for trial witnesses, and jurors discussing the case with each other during trial. Appellant also argues that the trial court failed to address air conditioning problems that caused excessive heat in the jury room during jury deliberations. Appellant asserts that conditions were "unbearable" and affected jury deliberations.

{¶ 107} The state argues that the trial court acted within the discretion granted in *State v. Waddell* (1996), 75 Ohio St.3d 163 (juror note-taking) and *State v. Fisher*, 99 Ohio St.3d 127, 2003-Ohio-2761 (jury questioning) in permitting jury note taking and jury questioning of witnesses. The state also argues that the trial court acted within its discretion in remedying the failure of a juror to follow court instructions not to discuss the case with others.

{¶ 108} Appellant acknowledges that he failed to raise these objections at trial and that they are deemed waived on appeal absent a showing of plain error.

{¶ 109} "Crim.R. 52(B) states that '[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.' Thus, there are 'three limitations on a reviewing court's decision to correct an error despite the absence of a timely objection at trial. First, there must be an error, i.e., a deviation from a legal rule. * * * Second, the error must be plain. To be "plain" within the meaning of Crim.R. 52(B), an error must be an "obvious" defect in the trial proceedings. * * * Third, the error must have affected "substantial rights." We have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial.' *State v. Barnes* (2002), 94 Ohio St.3d 21, 27, 759 N.E.2d 1240." *State v. Lynn*, 129 Ohio St.3d 146, 2011-Ohio-2722, ¶ 13.

{¶ 110} Under *Waddell* juror note-taking is to remain confidential and a juror's independent memory is to take precedence over notes. *Waddell* at paragraph three of the syllabus. *Fisher* identified procedures for jury questioning. See *Fisher* at ¶ 29; *State v. Gaston*, 6th Dist. No. L-06-1183, 2008-Ohio-1856, ¶ 44. Under *Fisher* procedures, the trial court is to "ensure that jurors do not display or discuss a question with other jurors until the court reads the question to the witness * * *." *Fisher* at ¶ 29.

{¶ 111} Here, the trial court instructed the jury at the beginning of trial: "[B]e sure that your note taking does not distract you from the witness testifying under oath, because part of the aspects of determining the credibility of a witness is the manner in which they testify * * *. And remember this, the memory of a note taking juror is no more or less

reliable than that of a non-note taking juror. And it certainly isn't a concise reflection of the testimony in a case."

{¶ 112} Steps were taken to keep the juror questions confidential. Jurors were instructed not to identify themselves on the sheet they submitted with written questions. Each juror submitted a sheet of paper, whether they were submitting a question or not. The sheets were to be blank if the juror did not submit a question. Jurors were repeatedly instructed not to discuss the case and not to form or express opinions concerning the case.

{¶ 113} Despite these procedures, the trial court noticed that Juror 8 had been talking to Juror 7 and Juror 9, in the jury box during trial when preparing written questions for trial witnesses. On its own, the court called a recess and outside the presence of the jury discussed with the parties the court's concerns as to Juror 8. Jurors 8, 7, and 9 were each questioned.

{¶ 114} Juror 8 admitted that she had asked other jurors about the evidence in order to fill in blanks in her notes. She did not wish to submit a question that had already been asked and answered by the witness. Earlier in the case Juror 8 reported that she told her husband, a neighbor, and the neighbor's husband (an assistant county prosecutor) that she was a juror on a triple murder case. The juror stated that she did not discuss the case but was told that the case was a big case.

{¶ 115} After both incidents, the trial court presented the parties with the option of removing the juror and substituting an alternate. Neither the appellant nor the state requested removal in either instance. After the second, defense counsel advised the court

that appellant was neutral and had no objection to the court's either keeping Juror 8 on the panel or replacing her with an alternate juror. Ultimately, the trial court removed the juror sua sponte and substituted an alternate juror in her place.

{¶ 116} A trial court is in the best position to determine the nature of any juror misconduct and an appropriate remedy for demonstrated misconduct. *State v. Dolman*, 6th Dist. No. WM-10-007, 2010-Ohio-5505, ¶ 44. After the three jurors testified, the trial court concluded that Juror 8 was well intentioned but failed to follow the court's instructions not to discuss the case.

{¶ 117} In our view, the court acted within its discretion in removing the juror. Its findings as to juror misconduct are supported in the record. Under the circumstances we find no abuse of discretion in the trial court's selecting removal as the appropriate remedy, rather than declaring a mistrial as now urged by appellant. We also find no basis in the record to conclude that the choice of remedy harmed appellant or affected the outcome at trial. Accordingly, we conclude that appellant failed to demonstrate plain error with respect to juror note-taking, jury questioning, and juror misconduct.

Conditions for Jury Deliberations

{¶ 118} The state disputes appellant's claim that jury deliberations were conducted in "unbearable" conditions due to poor air conditioning. The record includes a single complaint from one juror to the court concerning conditions in the jury room. The juror raised the issue on a Friday. Jury deliberations started on the following Monday.

{¶ 119} The juror informed the court that she was concerned that jury deliberations could pose a problem because she had a health condition making her sensitive to very warm conditions. The juror told the court that she was fine, but that she was concerned that future deliberations in the case could present a problem due to size of the jury room and the number of jurors. The court requested the juror to advise the court bailiff if conditions caused further difficulty.

{¶ 120} Deliberations proceeded the following Monday. The record does not include any complaints by jurors concerning the heat during deliberations and specifically no complaint by the juror who previously spoke with the court on the issue.

{¶ 121} The record does not include evidence to support a claim that conditions in the jury room were unbearable during jury deliberations so as to prevent appellant from having a fair trial. We conclude appellant failed to demonstrate plain error based upon court conditions for jury deliberations.

{¶ 122} We find Assignment of Error No. III is not well-taken.

{¶ 123} Under Assignment of Error No. VI, appellant claims trial court error with respect to certification of trial witnesses under former Crim.R. 16(B)(1)(e). The rule relates to discovery of names and addresses of witnesses where disclosure may subject the witness or others to physical or substantial economic harm or coercion. The trial court granted the state's motion to certify five witnesses under Crim.R. 16(B)(1)(e): Kenya Sharp, Lynette Avery, Daniel Ruffing, John Kuch, and Michael Dotson. Dotson did not testify at trial. The other four witnesses testified.

{¶ 124} The certification procedure has been recognized as a valid limitation on the right to confront witnesses under the Sixth and Fourteenth Amendments of the United States Constitution and Section 10, Article I of the Ohio Constitution. *State v. Carter* (May 21, 1999), 6th Dist. Nos. L-97-1162, L-97-1163, and L-97-1169; *State v. Daniels* (1993), 92 Ohio App.3d 473, 480.

{¶ 125} Appellant argues first that it was error for the trial judge to preside over witness certification motions rather than securing reassignment of certifications to another trial court judge citing *State v. Gillard* (1988), 40 Ohio St.3d 226, 229. However, the record demonstrates that another judge presided over witness certifications under Crim.R. 16(B)(1)(e), including ex parte hearings conducted on February 22, 2008, and on March 14, 2008.

{¶ 126} Next, appellant asserts that there was no basis in fact for any of the witness certifications, and that the certifications resulted in untimely discovery and a likely failure to provide discoverable materials. The state argues that there was substantial evidence supporting witness certification.

{¶ 127} Certification under former Crim.R. 16 required "the state's reasons for requesting witness protection to appear on the record." *Carter*, 6th Dist. Nos. L-97-1162, L-97-1163, and L-97-1169, citing *State v. Williams* (1986), 23 Ohio St.3d 16 and *State v. Owens* (1975), 51 Ohio App.2d 132. "The state must show the existence of an undue risk of harm in order to be relieved of its obligation to disclose the names of its witnesses. *Carter*, citing *Gillard*.

{¶ 128} We have reviewed the record, including hearing transcripts, and conclude that at the hearings on witness certifications, the state provided reasons for requesting witness protection on the record and evidence that the witnesses bore an undue risk of harm if their identities as witnesses were revealed before trial.

{¶ 129} We find Assignment of Error No. VI is not well-taken.

{¶ 130} The state disclosed the identity of certified witnesses and provided defense counsel with copies of statement summaries, of witness statements to police, at a pretrial hearing on Friday, May 30, 2008. (Trial commenced the following Monday.) At that time the state also submitted certain statement transcripts to the trial court under seal to permit in camera review under Crim.R. 16(B)(1)(g) at trial. At the pretrial, the trial court denied a request by appellant for the state to provide transcripts of all recorded witness statements prior to trial.

{¶ 131} Under Assignment of Error No. VII, appellant argues that he was denied effective assistance of counsel in violation of his rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Article I, Section 10 of the Ohio Constitution. Appellant argues that the certification under Crim.R. 16(B)(1)(g) of Sharp, Avery, Ruffing, and Kuch resulted in "production of discovery at the last possible moment" and he was denied effective assistance of counsel because the trial court "did not stop the trial to allow him an opportunity to thoroughly review the discovery and prepare effective cross-examination."

{¶ 132} To prevail on a claim of ineffective assistance of counsel, a defendant must prove two elements: "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense." *Strickland v. Washington* (1984), 466 U.S. 668, 687. Proof of prejudice requires a showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694; *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph three of the syllabus. When considering claims of ineffective assistance of counsel, a court presumes that a properly licensed attorney is competent. *State v. Hamblin* (1988), 37 Ohio St.3d 153, 155-156.

{¶ 133} Where a claim of ineffective assistance of counsel requires consideration of materials outside the record of proceedings in the trial court, the claim is not of the type that can be considered on direct appeal. *State v. Carter* (2000), 89 Ohio St.3d 593, 606; *State v. Davis*, 6th Dist. No. L-05-1056, 2006-Ohio-2350, ¶ 21.

{¶ 134} As this is a direct appeal, the record does not include any testimony or affidavit from counsel identifying deficiencies in his preparation due to failure to request a recess or continuance and arising from delayed discovery due to witness certification. The record demonstrates strong and effective cross-examination of John Kuch through use of the Navarre affidavit.

{¶ 135} In our view, the record fails to demonstrate that trial counsel was deficient in failing to seek additional time to review discovery materials or to prepare for cross-examination of certified witnesses. The record also fails to demonstrate that if counsel had secured a recess in trial proceedings that there is a reasonable probability that the outcome of trial would have been different.

{¶ 136} We find Assignment of Error No. VII is not well-taken.

{¶ 137} Under Assignment of Error No. VIII, appellant claims that prosecutors and police were guilty of misconduct at trial that denied him a fair trial.

{¶ 138} ""The test for prosecutorial misconduct is whether the [conduct was] improper and, if so, whether the [conduct] prejudicially affected the accused's substantial rights."" *State v. Crisp*, 3d Dist. No. 1-05-45, 2006-Ohio-2509, ¶ 10, quoting *State v. Twyford*, 94 Ohio St.3d 340, 354-355, 2002-Ohio-894. In order to grant a new trial for prosecutorial misconduct, we cannot merely find that the acts of the prosecutor are culpable, but must also find that these acts detrimentally affected the fairness of the proceedings. *Twyford*, 94 Ohio St.3d at 355, citing *Smith v. Phillips* (1982), 455 U.S. 209, 219." *State v. Jones*, 6th Dist. No. L-09-1002, 2010-Ohio-4054, ¶ 47.

{¶ 139} First, appellant asserts that the prosecutor mischaracterized testimony by Kenya Sharp as to whether she had been threatened by appellant and whether she was "scared" of appellant. The state argues that there was no misconduct as the comments concerning Kenya Sharp were fully supported by the evidence at trial.

{¶ 140} "Prosecutors must avoid insinuations and assertions calculated to mislead. They may not express their personal beliefs or opinions regarding the guilt of the accused, and may not allude to matters not supported by admissible evidence." *State v. Lott* (1990), 51 Ohio St.3d 160, 167, citing *State v. Smith* (1984), 14 Ohio St.3d 13, 14; *State v. Liberatore* (1982), 69 Ohio St.2d 583.

{¶ 141} In our view, Sharp's testimony reasonably supports claims that appellant threatened her. Sharp testified that appellant put a knife to her neck and told her that "I'll do you like they did Mike." Sharp also testified that appellant told her she also was supposed to be murdered that morning and repeated a statement by Goldy Thompson that "there were no witnesses to no homicides."

{¶ 142} Appellant argues next that Sharp testified that she was not afraid of appellant and that the prosecutor mischaracterized the evidence when questioning Detective Anderson at trial. Sharp testified before Anderson at trial. During cross-examination, the defense asked Sharp about offers of money made by Detective Anderson for her to testify. The prosecutor addressed the issue in his questioning of Anderson.

{¶ 143} The prosecutor asked Anderson about a conversation with Sharp where "she was stating how scared she was being * * *." Anderson answered that "we got into the we would help her move because she was scared and we tried to -- we went through Victim's Assistance to try to find a way to get her moved if she were to testify."

{¶ 144} We find appellant's claims of prosecutorial misconduct based upon claimed mischaracterization of testimony by Kenya Sharp are without merit. The statements by the prosecutor were reasonably supported by the evidence at trial.

{¶ 145} Appellant also asserts that the prosecutor's closing argument included "improper vouching and mischaracterization" that constitutes plain error. Appellant, however, presented no argument on the issue, merely referring to pages in the trial transcript and suggesting that "[t]he closing arguments should be reviewed for plain error." As appellant failed to identify any specific instance of improper vouching or mischaracterization of the evidence by the prosecutor during closing argument for court consideration, we conclude that appellant's argument of prosecutorial misconduct during closing argument is without merit.

{¶ 146} Appellant asserts that the state "sat silently as Kuch committed perjury." In cross-examination Kuch was asked at trial: "Have you ever told a different version of this event?" He answered: "No." In the May 16, 2007 recorded statement Kuch stated that his contact with appellant and Goldy Thompson occurred at 12:30 to 1:00 a.m. He testified at trial that contact occurred after 4:00 a.m. Appellant argues that the state's silence in response to the trial testimony by Kuch constituted prosecutorial misconduct.

{¶ 147} "'The knowing use of false or perjured testimony constitutes a denial of due process if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.'" *United States v. Lochmondy* (C.A.6, 1989), 890 F.2d 817, 822, citing *Bagley*, 473 U.S. at 678, 105 S.Ct. at 3381, 87 L.Ed.2d at 491. Such a

claim is in the nature of an allegation of prosecutorial misconduct, and the burden is on the defendant to show that '(1) the statement was actually false; (2) the statement was material; and (3) the prosecution knew it was false.' *Id.*, citing *United States v. O'Dell* (C.A.6, 1986), 805 F.2d 637, 641." *State v. Iacona* (2001), 93 Ohio St.3d 83, 97; see *State v. Manzell*, 5th Dist. No. 2006CA00258, 2007-Ohio-4076, ¶ 20-21; *Toledo v. Moore*, 6th Dist. No. L-02-1288, 2003-Ohio-2362, ¶ 31-30.

{¶ 148} The record is clear that the statement by Kuch at trial concerning whether his version of events had changed was false. Evidence is lacking in the record, however, to show that the prosecutor knew the statement was false. The statement summaries did not specify a time of contact. The prosecutor who examined Kuch at trial testified at the hearing on the motion for a new trial. He testified that he had no knowledge of the contents of the recordings when he questioned Kuch. At the hearing on the motion for a new trial, counsel for appellant acknowledged the state's failure to disclose the DVD recordings as inadvertent, explaining "we're not alleging malfeasance or some nefarious intent to hide this evidence." The trial court found, after testimony by prosecutors involved in the case, that the prosecutors behaved ethically and that the failure to disclose the DVDs was inadvertent and unintentional.

{¶ 149} Upon review of the record, we find that there is competent, credible evidence in the record supporting the trial court's determination of a lack of intentional misconduct by the prosecution in failing to disclose the DVDs to the defense. We conclude appellant failed to demonstrate knowing use of false or perjured testimony by

the prosecution at trial. Accordingly, we find appellant's claim of prosecutorial misconduct by knowing use of false testimony by Kuch is without merit.

{¶ 150} Appellant claims, without citation to the record, prosecutorial misconduct due to claimed violations by the state of the trial court's order in limine. Appellant failed to present an argument on the issue and failed to cite the place in the record where the claimed error occurred. We therefore decline to consider the issue pursuant to App.R. 12(A)(2).

{¶ 151} The remainder of appellant's argument under Assignment of Error No. VIII presents a restatement of arguments concerning sufficiency of the evidence, manifest weight of the evidence, and discovery of certified witnesses that have been considered and rejected earlier in this decision.

{¶ 152} We find appellant's Assignment of Error No. VIII is not well-taken.

{¶ 153} Under Assignment of Error No. IX, appellant argues trial court error with respect evidentiary issues at trial. A trial court's decision to admit or exclude evidence is reviewed on appeal under the abuse of discretion standard. *State v. Sage* (1987), 31 Ohio St.3d 173, paragraph two of the syllabus. The term abuse of discretion "implies that the court's attitude is unreasonable, arbitrary, or unconscionable." *Blakemore*, 5 Ohio St.3d at 219.

{¶ 154} Appellant argues trial court error in admitting evidence at trial that appellant was a drug dealer and possessed a gun. We address evidence of the gun first. Roger Barnett testified that he saw a .22 or .25 caliber automatic pistol in the door panel

of appellant's truck. John Kuch testified to selling appellant handguns including a .22 or .25 semi-automatic pistol prior to the time of the murders.

{¶ 155} Appellant argues that the evidence of possession of a semi-automatic handgun violated the trial court's order in limine as to evidence of criminal acts or illegal conduct and was irrelevant. The state contends that the evidence of possession was directly relevant because the victims were all shot with a .25 caliber semi-automatic handgun.

{¶ 156} We find no abuse of discretion in the trial court's allowing testimony as to possession or ownership of a semi-automatic handgun even though the witnesses were uncertain as to whether it was .22 or .25 caliber weapon. Each victim was shot with a .25 caliber bullet from the same semi-automatic handgun. Evidence of ownership or access to a possible murder weapon was relevant.

{¶ 157} In our view the uncertainty as to whether the weapon to which appellant had access was a .22 or .25 caliber weapon goes to the weight of the evidence and not its admissibility, and that the trial court acted within its discretion in admitting the evidence.

With respect to evidence that appellant was a drug dealer, the state contended at trial that appellant's motive for involvement in the killings was theft of drugs and a substantial sum of cash, which was kept at appellant's apartment as part of appellant's operations as a drug dealer. Testimony that the three victims planned and committed the theft is supported by evidence that appellant was a drug dealer and that Mike York knew

where appellant kept his cash and drugs. The evidence of theft of the drugs and cash is directly relevant to prove motive for the killings.

{¶ 158} Evid.R. 404(B) permits use of relevant other acts evidence for purposes "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Ohio cases have recognized that proof of other acts establishing that a criminal defendant was a drug dealer is admissible under Evid.R. 404(B) under similar circumstances. *State v. Hill* (1987), 37 Ohio App.3d 72, 74-75 (Evidence of defendant's drug dealing was admissible where claimed motive was drug theft and testimony of drug dealing "created a framework for considering whether appellant was motivated by revenge."); *State v. Vales*, 8th Dist. No. 81788, 2003-Ohio-6631, ¶ 31 (Evidence defendant was a drug dealer was admissible as showing motive to shoot victim after drug deal failed.)

{¶ 159} We conclude that the trial court did not abuse its discretion in admitting evidence at trial that appellant was a drug dealer as the evidence was admissible to prove motive.

{¶ 160} Kenya Sharp testified as a state witness and was subject to substantial impeachment on cross-examination by the defense based upon asserted threats and rewards. The state brought felony charges against Sharp for obstruction of justice and receiving stolen property and dismissed both charges on September 21, 2007, after Sharp made her statement to police on that date. Sharp also testified on cross-examination that

police offered her money and vacations. Sharp testified that Detective Anderson threatened to take away her children.

{¶ 161} Sharp also testified that she regularly used drugs during the weeks and months surrounding the killings and that she was "probably" high from drugs when she gave statements to police in August and September 2007.

{¶ 162} Over objection, the trial court permitted the state to play portions of the audio-visual recording of the September 21, 2007 statement by Sharp to police after cross-examination by the defense at trial. The court ruled that the recording was admissible under Evid.R. 801(D)(1)(b) to rebut claims of improper influence or motive for Sharp's testimony against appellant.

{¶ 163} Appellant argues on appeal that there were other ways the state could have rehabilitated its witness rather than using portions of the September 21, 2007 recorded statement. Appellant has not claimed that the evidence was not otherwise admissible under Evid.R. 801(D)(1)(b) and has failed to present any specific argument that use of the evidence was more prejudicial than probative. Accordingly, we find that the trial court did not abuse its discretion in permitting use of portions of the recorded statement to rebut claims of improper influence or motive.

{¶ 164} Appellant asserts that limiting instructions to the jury in the case were "woefully inadequate" but failed to identify the limiting instructions to which appellant objects, failed to cite references in the record where the trial court erred as to limiting instructions, and failed to make any specific legal argument as to trial court error with

respect to limiting instructions. We therefore decline to consider the issue pursuant to App.R. 12(A)(2).

{¶ 165} We find Assignment of Error No. IX is not well-taken.

{¶ 166} Under Assignment of Error No. X, appellant asserts that he was denied effective assistance of counsel in violation of his rights both under the Sixth Amendment to the United States Constitution and Article I, Section 10 and 16 of the Ohio Constitution. Appellant lists six separate instances under this assignment of error where he claims trial counsel was constitutionally deficient. We considered the necessary elements to establish ineffective assistance of counsel under Assignment of Error No. VII.

{¶ 167} Appellant asserts first that trial counsel was deficient for failing to insist that the trial court "properly have the certified witnesses evaluated." The record demonstrates, however, that the requirements of Crim.R. 16(B)(1)(e) were followed. The issue of whether an undue risk of harm existed from disclosure of the names of the witnesses was evaluated by a judge who presided over two ex parte hearings on witness certification.

{¶ 168} Appellant's second claimed instance of ineffective assistance of counsel restates appellant's assertion under Assignment of Error No. VII that counsel was deficient in failing to seek additional time to prepare for cross-examination of certified witnesses. We hold the argument is without merit for the grounds stated under Assignment of Error No. VII.

{¶ 169} Third, appellant argues that counsel was deficient for failing to request a mistrial based on juror note taking, jury questions, and a juror's failure to comply with court instructions not to discuss the case. We considered the claimed trial court error with respect to these issues under Assignment of Error No. III. We concluded under Assignment of Error No. III that the trial court did not err in permitting the jury to take notes and to submit written questions for witnesses. We also concluded that the trial court acted within its discretion by removing one juror and substituting an alternate juror due to the juror's failure to follow court instructions.

{¶ 170} Under this assignment of error, appellant claims that counsel was deficient for failing to move for a mistrial on the same grounds. We disagree. A motion for a mistrial on these grounds would have been without merit and denied.

{¶ 171} Next appellant argues that it was ineffective assistance of counsel for trial counsel to fail to raise the issue at trial of air conditioning problems with the jury room for evaluation and to propose that the jury be moved to another room with better air conditioning. We also considered air condition difficulties with respect to the jury room under Assignment of Error No. III.

{¶ 172} In our view, the record fails to demonstrate that temperature conditions in the jury room were sufficiently difficult so as to affect jury deliberations and deny appellant a fair trial. Accordingly we find the claim of ineffective assistance of counsel based upon the failure of trial counsel to object to conditions in the jury room is without merit.

{¶ 173} Appellant's fifth claim of ineffective assistance of counsel is based upon an unspecified failure of counsel to make "hearsay and other valid objections." Appellant has not identified specific questions for which objection should have been made on the basis of hearsay. Appellant also failed to argue prejudice from any hearsay admitted at trial. Accordingly, we conclude that appellant failed to demonstrate counsel was deficient in failing to object to questions on the basis of hearsay and also failed to establish that the outcome of trial would have been different had objections been made. Accordingly, we conclude that appellant's arguments of ineffective assistance of counsel due to the failure to object to hearsay testimony at trial are without merit.

{¶ 174} Appellant's final contention under Assignment of Error No. X is that trial counsel was deficient in failing to ask for limiting instructions regarding hearsay and character evidence offered at trial concerning Goldy Thompson, his brother. Appellant cited no reference to the record identifying where the claimed error occurred and has presented no argument in support of ineffective assistance of counsel on this ground. We decline to consider the claimed error pursuant to App.R. 12(A)(2).

{¶ 175} We find Assignment of Error No. X is not well-taken.

{¶ 176} Under Assignment of Error No. XI, appellant argues that the trial court abused its discretion by imposing three consecutive sentences of life without parole.

{¶ 177} In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 26, the Ohio Supreme Court set forth the standard of review on appeal of felony sentencing. Appellate courts "must examine the sentencing court's compliance with all applicable rules and

statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court's decision in imposing the term of imprisonment is reviewed under the abuse-of-discretion standard." Appellant does not claim that his sentence is contrary to law.

{¶ 178} Appellant claims that the trial court abused its discretion by imposing three consecutive sentences of life without parole. He argues that he was convicted of complicity in the commission of aggravated murder, while the alleged principal in the murders, his brother, was acquitted. However, the complicity statute expressly provides that "[i]t is no defense to a charge under this section that no person with whom the accused was in complicity has been convicted as a principal offender." R.C. 2923.03(B).

{¶ 179} Appellant also contends that his prior criminal record was limited, included no history of violence, and that under the circumstances his sentences to life without parole are an abuse of discretion.

{¶ 180} The trial court reviewed appellant's criminal record at the sentencing hearing. Appellant's criminal record includes adjudication as a delinquent on one felony and three misdemeanors. As an adult, appellant's record includes convictions for three felonies and three misdemeanors. Adult felony convictions included a conviction for possession of crack cocaine in 1999 and convictions for having a weapon under disability both in 2003 and 2006. Misdemeanors as an adult included a conviction in 2007 for domestic violence.

{¶ 181} The court reviewed at sentencing the evidence as to the manner of each of the killings – that the murders were brutal, carried out by shooting, stabbing, and beating the victims to death and the murders were committed with prior calculation and design.

{¶ 182} In *State v. Foster*, 109 Ohio St.3d 1, 2006–Ohio–856, the Supreme Court of Ohio held that trial courts "have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." *Id.* at ¶ 100. The Ohio Supreme Court has reaffirmed that this discretion includes "inherent authority to determine whether a sentence within the statutory range shall run consecutively or concurrently." *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, ¶ 33, quoting *State v. Bates*, 118 Ohio St.3d 174, 2008-Ohio-1983, ¶ 19.

{¶ 183} Abuse of discretion "implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore*, *supra*. "An appellate court applying an abuse of discretion standard may not substitute its judgment for that of the trial court. See *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621." *State v. Harthorne*, 6th Dist. Nos. L-09-1207, L-09-1208, and L-09-1209, 2010-Ohio-5645, ¶ 14.

{¶ 184} We find that the trial court acted within its discretion in sentencing appellant to serve a term of imprisonment for life without parole on each count of appellant's convictions for complicity in the commission of aggravated murder. Accordingly, we find Assignment of Error No. XI is not well-taken.

{¶ 185} On consideration whereof, the court finds that appellant was not prejudiced or prevented from having a fair trial. The judgments of the Lucas County Court of Common Pleas are affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENTS AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.