

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,
Appellee

: Appeal No. C-130307
: Trial No. B-1002888

vs.

14-1280

ROBERT DAVENPORT,
Appellant

APPEAL FROM THE COURT OF APPEALS
FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO

MEMORANDUM OF APPELLANT
IN SUPPORT OF JURISDICTION

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ISSUES OF THIS CASE RAISE SUBSTANTIAL CONSTITUTIONAL
QUESTIONS AND ARE OF GREAT PUBLIC INTEREST

This matter raises constitutional questions and questions of great public interest concerning evidence erroneously admitted in violation of Evid.R.403, misuse of Crim.R.16(D) by the prosecutor, and ineffective assistance of counsel.

STATEMENT OF THE CASE AND PROCEDURAL POSTURE

On May 3, 2010, police arrested Robert Davenport in connection with a homicide that had taken place 21 days before. However, there was but one clear fact: on April 12, 2010, Lincoln Lewis was shot and killed. Beyond that, the facts are extremely muddy.

Three alleged eyewitnesses to the murder testified for the state at trial. Albert Lewis, the cousin of Mr. Lewis, said on April 12, 2010, he heard a gunshot and saw two men running; he told police he saw the men bend down and touch Mr. Lewis. One man was wearing a yellow shirt and had a gun in his hand. That man was short, five-foot-seven, about 150 pounds, dark-skinned, hair cut, was wearing black pants, and appeared to be 16 or 17 years old; the other man was wearing a light blue shirt. At trial, he could not recall what the man in the yellow shirt looked like. On April 25, 2010, Mr. Lewis was shown six photographs of potential suspects; he chose Mr. Davenport's photo, though he was no more than 50 percent sure.

Agnes Williams testified that on the day of the murder, she noticed Mr. Lewis. Two men were walking behind him; the shorter of the two men shot him with a black handgun. On the day of the shooting, however, she told police the handgun was silver. She testified the shooter appeared to be in his late teens or early twenties, stood about five-foot-four, had short hair, was wearing jeans and a yellow T-shirt, and did not have any noticeable facial hair or tattoos. The second man was wearing a red T-shirt. She also was quite confused about the height of the

shooter. She said he was about an inch shorter than Mr. Lewis, who was about five-foot-eight. On the day of the shooting, however, she told police that the shooter and his accomplice were about the same height and weight as Mr. Lewis. A third story was told on May 3, 2010, as Ms. Williams told police the accomplice was about six-foot-one. She also testified the shooter went through Mr. Lewis' pockets and tried to take his cell phone, but dropped it and ran off; and Mr. Lewis decided to take his sunglasses off after being shot, and handed them over to the shooter. On May 3, 2010, Ms. Williams was shown a photo array of potential suspects. Although Mr. Davenport's photo was number 5 of 6, it was on top of the stack of photographs and shown to Ms. Williams first. The photographs were handed to Ms. Williams face down where they were numbered on the back. Therefore, it would have been clear to Ms. Williams the photographs were out of order. After reviewing them, she identified Mr. Davenport as the shooter.

The final alleged eyewitness was Gregory Master. Mr. Master was a convicted felon with several aliases who was on valium and oxycodone on the day of the shooting. He testified he saw Mr. Davenport and another man, and Mr. Davenport appeared to be 14 or 15 years old, with tattoos on his neck. He alleged Mr. Davenport pulled out a black gun and shot Mr. Lewis. The men took something off Mr. Lewis, then walked away. On April 28, 2010, Mr. Master was shown the same photos as the other witnesses. He picked Mr. Davenport as the shooter.

Charae Henson, the mother of Mr. Davenport's son, testified on his behalf. Around the time of the shooting, she exited a bus and saw Mr. Davenport with three friends. The group proceeded to a daycare center where she picked up her son; they then proceeded toward her home. The group split up, with Mr. Davenport staying with her and their son. Ms. Henson noticed Mr. Lewis on the street. As she and Mr. Davenport were nearing her home, they heard a

gunshot. Mr. Davenport took their son into her home and then left to see what had happened.

Several Cincinnati Police officers involved in the investigation testified at trial. Officer Matthew Waters collected Mr. Lewis' cell phone and gave it to Criminalist Paul Glindmeyer. There was also a 9mm Luger shell casing found at the scene. Criminalist Glindmeyer tested the shell casing for fingerprints and DNA, but found neither. He also tested the cell phone for fingerprints and DNA; neither Mr. Davenport's fingerprints nor DNA were found on the phone.

A search warrant was executed on the apartment where Mr. Davenport was allegedly staying. A plastic bag containing six Wolf brand 9mm Luger cartridges, a yellow jacket, a pair of canvas shoes, a FC brand 9mm plus P plus cartridge, another Wolf 9mm Luger cartridge by itself in a piece of plastic, and one CBC brand .45 caliber cartridge were collected. There were no fingerprints found on either of the plastic baggies nor on any of the cartridges recovered.

William Harry, a serologist at the Hamilton County Coroner's Laboratory, tested the interior of the yellow jacket, Mr. Lewis' phone, and the plastic for DNA. Mr. Davenport was excluded as a contributor to any DNA found on the objects. Mr. Lewis' DNA was found on his cell phone. No evidence was located near the location of the shooting. The sunglasses that were allegedly taken from Mr. Lewis were never located. No handgun was ever recovered.

Two police interviews with Mr. Davenport and a portion of calls he made from jail were played at trial. Mr. Davenport never directly admitted to murdering or robbing Mr. Lewis.

Based on this evidence, Mr. Davenport was indicted for aggravated murder, felony murder, aggravated robbery, all with three-year firearm specifications attached, and having weapons while under disability. On August 5, 2010, the prosecutor filed a certification of non-disclosure under Crim.R. 16(D). The next day, defense counsel filed motions to compel the

disclosure of witnesses and to suppress eyewitness identification. Both motions were denied.

Non-disclosure was challenged seven days before trial, but the certification was granted. After the jury was selected, but before it was sworn, counsel filed a motion to dismiss/motion for mistrial due to the volume and nature of recently disclosed discovery. After a hearing, the motion to dismiss was denied, but the jury was discharged and a new trial date was set.

One month later, the case was tried before a new jury, which returned verdicts of guilty to all the counts and specifications. Mr. Davenport was sentenced to life with parole eligibility after 30 years. The sentence was ordered to be served consecutively to a three-year term for the firearm specification, as well as to a three-year prison term imposed for the weapons charge.

An appeal was timely filed on May 24, 2013 in the First District Court of Appeals. An Opinion affirming the judgment of the trial court, but remanding for resentencing, was entered on June 27, 2014 by the First District; it is from that Decision which Mr. Davenport appeals.

FIRST ASSIGNMENT OF ERROR AND PROPOSITION OF LAW

The trial court erred to the prejudice of Appellant by granting the state's certification of non-disclosure of all civilian witnesses, in violation of Appellant's Due Process Rights and right to a fair trial pursuant to the Fifth and Sixth Amendments to the United States Constitution and Section I, Article 10 of the Ohio Constitution.

1. The trial court abused its discretion when it granted the state's certification.

In 2010, the Ohio Rules of Discovery in criminal cases were completely overhauled. The purpose of these changes was announced in the first paragraph of the newly enacted rule which states that the "rule is to provide all parties in a criminal case with information necessary for a full and fair adjudication. . . ." This purpose is expounded upon in the Staff Notes:

The purpose of the revisions to Criminal Rule 16 is to provide for a just determination of criminal proceedings and to secure the fair, impartial, and speedy administration of justice through the expanded scope of materials to

be exchanged between the parties. . . . The limitations on disclosure permitted under this rule are believed to apply to the minority of criminal cases.

Crim.R. 16(I) requires each party to provide a written list of witnesses it intends to call at trial. In accordance with Crim.R. 16(D), the prosecuting attorney may certify to the court that such disclosure of witnesses is not being made to opposing counsel; Crim.R. 16(D)(1-5) identifies the reasons that the state may rely upon in requesting such certification. Rule 16(D) requires that any certification be case specific and requires the state to provide facts leading to reasonable grounds to support the non-disclosure.

In the case at bar, the state presented several general arguments to support its certification of non-disclosure. None of these arguments were sufficient to justify the non-disclosure of discovery to which Mr. Davenport was entitled. Instead, the state offered a non-specific, “cookie cutter” pleading. In fact, identical pleadings are now filed routinely in Hamilton County by the Prosecuting Attorney’s Office in homicide cases.¹

In the present case, the state filed a certification with the trial court on August 5, 2010, requesting that all civilian witnesses be exempt from disclosure. The state based its certification

¹*State v. Jones*, B1007154; *State v. Hoover*, B1006797; *State v. D’Angelo*, B1005682; *State v. Holmes*, B1007197; *State v. Peake*, B097307; *State v. Richardson*, B1002161; *State v. Walker*, B1004742; *State v. Kennedy*, B1104558; *State v. White*, B1105473; *State v. Wright*, B1107596; *State v. Dawson*, B1200188; *State v. Everett*, B1203778; *State v. Lattimore*, B1204059; *State v. Davis*, B1205944; *State v. Lee*, B1207037; *State v. Collier*, B1205720; *State v. Turner*, B1207592; *State v. Scott*, B1208122; *State v. Cofer*, B1208256; *State v. Frazier*, B1208535; *State v. Sanders*, B1300037; *State v. James*, B1300372; *State v. Stringer*, B1004021; *State v. Scott*, B1005260; *State v. Williams*, B1006255; *State v. Trollinger*, B1006545; *State v. Hill*, B1006833; *State v. Jones*, B1007154; *State v. Woods*, B1100377; *State v. Thompson*, B1100881; *State v. Simmons*, B1102268; *State v. Thomas*, B1106802; *State v. White*, B1107596; *State v. Brown*, B1200189; *State v. Kirkland*, B1201963; *State v. Williams*, B1203511; *State v. Amison*, B1205379; *State v. Dukes*, B1206128; *State v. Douglas*, B1206189; *State v. Hampton*, B1207814; *State v. Stevelt*, B1207476; *State v. Coston*, B1207494; *State v. Richardson*, B1207965; *State v. Nelson*, B1207993; and *State v. Branner*, B1207866.

of non-disclosure solely on Crim.R. 16(D)(1), stating it did not disclose witnesses because it had “reasonable, articulable grounds to believe that disclosure will compromise the safety of a witness, victim, or third party, or subject them to intimidation or coercion.” However, in its pleading, the state presented neither reasonable nor articulable grounds for the certification other than witnesses were killed in two old cases, *State v. Gilbert*, Case No. B0901283 and *State v. Kriswell*, Case No. B1001428. The state asserted that “in virtually every homicide case, coercion and threats to the witnesses now play a critical role” as its justification for non-disclosure in this particular case. This was not sufficient, as there was nothing in the state’s certification to allege case-specific facts that suggested any witness in the instant case had been threatened or harmed. The state then pursued this argument further, stating, “intimidation is present in all major criminal cases. It is impossible to predict how or when it will occur, and the only solution is preventive action.” Essentially, this expands a general policy by the Prosecutor’s Office of non-compliance with the Rules of Discovery in all “major cases” by taking “preventive action” and failing to advise opposing counsel of who will testify. Surely this is not the purpose of the Rules of Discovery, and such a general policy of non-disclosure violates Mr. Davenport’s rights to Due Process and a fair trial. Therefore, the certification failed to comply with Crim.R. 16.

The Staff Notes to the Rule make clear the filing before the trial court failed to comply with the Rule.

Division (D): Prosecuting Attorney’s Certification of Nondisclosure: This division provides a means to prevent disclosure of items or materials for limited reasons. The prosecution must be able to place reasonable limits on dissemination to preserve testimony and evidence from tampering or intimidation, and certain other enumerated purposes. The new rule explicitly recognizes that it is the prosecution’s duty to assess the danger to witnesses and victims, and the need to protect those witnesses and victims by controlling the early disclosure of certain material, subject to judicial review. A nondisclosure must be for one of the

reasons enumerated in the rule, and must be certified in writing to the court. The certification need not disclose the contents or meaning of the non-disclosed material, but must describe it with sufficient particularity to identify it during judicial review as described in division (F).

The Rule is meant to be invoked in limited cases. It is intended when a prosecutor has facts present in a case to justify a request to keep identities of witnesses a secret until a hearing is held on the request for non-disclosure. In the case at bar, the state admitted in its pleading there was nothing present in this case other than “experience has shown that intimidation is present in virtually all major criminal cases.” This position violates Crim.R. 16, as there was no evidence whatsoever presented in the pleading that any potential witnesses were being subjected to physical or economic harm or coercion.

Further, at the hearing held on August 13, 2012, the state again cited to the *Gilbert* and *Kriswell* cases which had no bearing on the case at bar. The only case-specific reasoning given was that Mr. Davenport (who had been incarcerated since his arrest in 2010) and his family and friends (no identification of which family and friends) had made attempts to identify and contact witnesses (no dates or times were given as to when these attempts were made). Finally, it was alleged that police cars were sent on one occasion in regards to aggravated menacing charges being filed. However, once again, no date or time was given; no names of whom the cars were sent out to investigate; and no evidence presented of any criminal charges actually being filed.

Further, what is telling in the case is the fact that, after the witnesses' names were disclosed and the case continued for approximately one month, there was absolutely no evidence that any of the witnesses were in any way threatened or coerced by Mr. Davenport or anyone representing him during that time. This adds credence to Mr. Davenport's assertion that there was no justification for the certification of non-disclosure to be requested and granted.

Because of this abuse of discretion in granting the certification, Mr. Davenport was prejudiced and deprived of the ability to adequately and effectively defend himself. Such non-disclosure of witnesses' names creates a tremendous disadvantage to the defense. Potential prosecution witnesses may have substantial credibility issues, and the defense would not have time to investigate their credibility nor the opportunity to adequately discuss and prepare a sufficient cross-examination. In a practical sense, allowing non-disclosure of all civilian witnesses would lead to repeated requests by the defense for recesses between witnesses in order to prepare for cross-examination. Additionally, since these potential witnesses were civilians, as opposed to law enforcement officers, the defense would need sufficient time to retrieve prior criminal records, if any, and prior statements of all such witnesses. This would inevitably result in a substantial disruption to the trial. Finally, of significant importance is the potential ethical problems that may develop should this Court allow for non-disclosure. It is conceivable that one or more non-disclosed witnesses may have been represented by defense counsel or have professionally consulted with counsel. If so, there would be an immediate conflict and ethical issue for defense counsel. Therefore, it was an abuse of discretion to grant such Certification.

2. The trial court abused its discretion when it denied Appellant's Motion to Dismiss.

On March 17, 2013, on the eve of trial, defense counsel was finally presented with the names of witnesses and transcripts of interviews conducted by the Cincinnati Police Department with such witnesses. Twelve potential witnesses were provided, with eight witnesses providing favorable evidence to Mr. Davenport. Because of the multitude of witnesses provided and the exculpatory nature of their statements, Mr. Davenport filed a Motion to Dismiss on March 20.

The United States Supreme Court has held that a prosecuting attorney has a continuing

duty to provide exculpatory evidence to a defendant. *See Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995); *Strickler v. Greene*, 527 U.S. 263, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999); and *Youngblood v. West Virginia*, 547 U.S. 867, 126 S. Ct. 2188, 165 L. Ed. 2d 269 (2006). Under *Kyles*, exculpatory evidence includes all favorable evidence including, but not limited to, evidence that provides grounds for the defense to attack the reliability, thoroughness, or good faith of the police investigation, to impeach the credibility of the state's witnesses, or to bolster the defense case against prosecutorial attacks. In his Motion to Dismiss, Mr. Davenport listed eight witnesses whom the state did not intend to call, but whose identities were kept from Mr. Davenport and who were favorable to him. Therefore, that motion should have been granted by the trial court, as the prosecutor misused Crim.R. 16 to circumvent its obligation to provide the defense with exculpatory evidence and to violate Mr. Davenport's Due Process Rights.

SECOND ASSIGNMENT OF ERROR AND PROPOSITION OF LAW

The prosecutor committed error prejudicial to Appellant's right to Due Process and a fair trial under the United States and Ohio Constitutions by improperly eliciting evidence of witness intimidation in violation of Evid.R. 403 and 404(B).

The state's misuse of witness-intimidation evidence was complete: they did not use it for the certification when they had a duty to, but rather used it at trial, when it was improper and in violation of Evid.R. 403 and 404(B). This deprived Mr. Davenport of his right to Due Process and a fair trial.

Evidence of witness intimidation is admissible to prove consciousness of guilt and criminal intent under Evid.R. 404(B), but only if the evidence (1) is related to the offense charged and (2) is reliable. *State v. Abdelhaq*, 8th Dist. Cuyahoga No. 74534, 1999 WL 1067924

(Nov. 24, 1999); *United States v. Rowley*, 155 F.3d 563 (4th Cir. 1998). The error is prejudicial when, as in this case, identification is established by eyewitness testimony. *Compare State v. Hirsch*, 129 Ohio App.3d 294, 717 N.E.2d 789 (1st Dist. 1998).

Over a defense objection, the court permitted the prosecutor to elicit from Police Officer Marcus McNeil there was a low level of cooperation from residents of neighborhoods near where the murder occurred. On cross-examination, the officer admitted he never tried to contact a witness and had no personal knowledge of a witness refusing to cooperate. On redirect, the state tried to elicit additional witness-intimidation evidence after the trial court sustained repeated defense objections. After the defense set out a basis for a continuing objection, the prosecutor asked whether “there are a lot of eyes and ears in the neighborhood” and the affirmative response survived an objection. The witness-intimidation evidence came up frequently in the state’s case; it reached critical mass when Ms. Williams was asked about visits from Mr. Davenport’s father.

Witness-intimidation evidence did not directly address the issue of whether Mr. Davenport shot Mr. Lewis, but the prejudice that accrued to him was great. The evidence did not, for example, identify Mr. Davenport as the shooter. *Compare State v. Townsend*, 7th Dist. Mahoning No. 04 MA 110, 2005-Ohio-6945, ¶61 (improper witness-intimidation evidence harmless due to identification of the defendant). Therefore, the evidence violated Evid.R. 403 and was prejudicial because the state used it in its closing bolster Ms. Williams’ credibility.

Evidence of witness intimidation in this case also implies the commission of a prior bad act in violation of Evid.R. 404(B). *State v. Phelps*, 12th Dist. Warren No. CA2009-04-035, 2010-Ohio-1105. Evidence of prior misconduct, unjustified by any exception to the prohibition, is inadmissible. *State v. Hector*, 19 Ohio St.2d 167, 249 N.E.2d 912 (1969). A prosecutor who

knowingly elicits this evidence commits misconduct. *State v. Ajumu*, 8th Dist. Cuyahoga No. 95285, 2011-Ohio-2520. The test regarding prosecutorial misconduct is whether the conduct is improper and, if so, whether it prejudicially affected substantial rights of the defendant. *State v. Lawson*, 64 Ohio St.3d 336, 347-48, 595 N.E.2d 902 (1992). The conduct infected the trial with unfairness, and Mr. Davenport was denied Due Process as a consequence. *Donnelly v. DeChristoforo*, 416 U.S. 637, 642, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974).

A second instance of misconduct was the improper use of victim-impact evidence. The use of victim-impact evidence to obtain a conviction in a criminal case is improper because the evidence is irrelevant and immaterial to guilt or innocence, yet it inflames the passion of the jury. *State v. Belpulsi*, 8th Dist. Cuyahoga No. 72230, 1998 WL 767609 (Oct. 29, 1998), citing *State v. White*, 15 Ohio St.2d 146, 239 N.E.2d 65 (1968). Under some circumstances, victim-impact evidence may be admissible because it serves another purpose; for example, the evidence may illustrate the nature and circumstances of the crime. See *State v. Fautenberry*, 72 Ohio St.3d 435, 650 N.E.2d 878 (1995). Otherwise the evidence is improper, irrespective of whether counsel objects. *State v. Hunter*, 8th Dist. Cuyahoga No. 86048, 2006-Ohio-20, ¶¶66-69.

Here, the state called the victim's mother, Angela Lewis-Thiam, who testified about her son's relationship with his immediate family members and employment history. She testified to being called to the hospital where she was informed that he had died. Her testimony about the hospital visit was especially emotional, but not in any way probative of guilt or innocence. Her only testimony related to admissible evidence was her informing police of possible witnesses and an identification of her son's cell phone, which was found at the scene. After she testified, she was permitted to sit behind the prosecutors for the remainder of the trial. The defense objection

was that “she is not a fact witness. She did not see it. She doesn’t know who did it, as a result.”

The state called Moustapha Thiam, the victim’s step-father, who testified to the victim’s music endeavors, how he left the house for the last time and never returned, and the unpleasant task of identifying his dead body. The state also failed to redact evidence of gang membership from Mr. Davenport’s statement to police; and made reference to a “known DNA report” from Mr. Davenport, implying that he had previously come to the attention of law enforcement.

During closing argument, the state said that evidence relating to a robbery, which was weak, applied only to Mr. Davenport’s purpose in committing the homicide offenses, despite the fact that a robbery had to be proven for the aggravated murder. The prosecutor said that if Mr. Davenport were to be acquitted, Donte Martin, the accomplice, would never be charged. Finally, the prosecutor intimated that Charae Hilton was a liar by saying that she had “fake crocodile tears.” The state committed misconduct, and the behavior was prejudicial to the defense.

THIRD ASSIGNMENT OF ERROR AND PROPOSITION OF LAW

The trial court abused its discretion in denying the motion for mistrial in the face of a violation of Appellant’s Sixth Amendment Right to compulsory process and prosecutorial misconduct.

Police contacted defense witnesses to inform them that Mr. Davenport would be facing four murder charges. Yet the trial court denied the motion for mistrial based upon prosecutorial misconduct. The decision denying a motion for mistrial is reviewed under an abuse-of-discretion standard. *State v. Abboud*, 13 Ohio App.3d 62, 63, 468 N.E.2d 155 (8th Dist. 1983). It is error for a trial court to deny the motion when it appears that error has been injected into the proceedings to such an extent that a fair trial is no longer possible. Prosecutors engaged in misconduct by sending Officer Wloszek to visit defense witnesses at their residence on the eve of

their testimony for the sole purpose of informing them that Mr. Davenport was a bad person and had committed or was suspected of committing four homicides.

When law enforcement contact with defense witnesses results in intimidation, police intent in contacting the witnesses or the assertion of good faith is irrelevant. *United States v. Morrison*, 535 F.2d 223, 227 (3rd Cir. 1976). Further, any action by the state to prevent a defense witness from testifying is inherently prejudicial. *Bray v. Peyton*, 429 F.2d 500, 501 (4th Cir. 1970). Dismissal of the indictment has been employed as a remedy, irrespective of a showing of prejudice, for reasons of deterrence from infringement of the right under the Sixth Amendment to call witnesses. *State v. Smith*, 2nd Dist. Montgomery No. 8228, 1983 Ohio App. LEXIS 12165 (Oct. 25, 1983).

Here, witness intimidation was brought to light the last day of trial. Prosecutors had ordered the officer and other police officers to visit three defense witnesses at their residence on the eve of their testimony. The sole purpose of the visit was to inform them Mr. Davenport was a bad person who “has four murder cases on him right now, pending or will be pending.” In response, the prosecutor averred that her office asked police to interview the witnesses, and their request was made prior to a separation order. The state pointed out the defense witnesses did come to court in response to the defense subpoenas, but this was immaterial to the fact the state intentionally attempted to keep them from doing so. Only one of the three eventually testified. This contact by police with defense witnesses, informing them that Mr. Davenport was a bad person and committed four murders, demoralized the defense witnesses and tended to prevent their testimony; it violated Mr. Davenport’s right to compulsory process, and the trial court erred in denying the motion for mistrial. The third assignment of error should be sustained.

FOURTH ASSIGNMENT OF ERROR AND PROPOSITION OF LAW

Appellant was deprived of his right to the effective assistance of counsel at trial, as defense counsel's performance fell below an objective standard of reasonableness and Appellant was prejudiced.

Mr. Davenport was deprived of his right to the effective assistance of counsel. A claim of ineffective assistance of counsel is shown by counsel's performance falling below an objective standard of reasonableness and, in addition, the deficient performance was prejudicial.

Strickland v. Washington, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

There are three instances of ineffective assistance. First, counsel failed to timely object to improper victim-impact evidence. Defense counsel only objected to Ms. Smith being seated in the courtroom, not to her testimony or that of the victim's stepfather. A decision not to object to victim-impact evidence is considered tactical. *State v. Mundt*, 115 Ohio St.3d 22, 34, 2007-Ohio-4836, 873 N.E.2d 828. But in this case, the evidence was pervasive and counsel had a duty to either to make a motion in limine or object at trial. Trial counsel had a duty to protect Mr. Davenport from evidence that was inadmissible under Evid.R. 403. By not objecting to this evidence, counsel failed in this duty.

Counsel was also ineffective for failing to either file a motion in limine or to ask for a limiting instruction with respect to witness-intimidation evidence and the reference during interrogation to membership in the Midget Killers gang. The information should have been challenged because Mr. Davenport was not in a position to deny the instances of unrelated misconduct of which he was accused by the police. *State v. Kidder*, 32 Ohio St.3d 279, 284, 513 N.E.2d 311 (1987). At a minimum, a limiting instruction should have been requested, explaining the allegations of uncharged misconduct were used by police as an interrogation tactic. *State v.*

Craycraft, 147 Ohio Misc.2d 5, 2008-Ohio-2192, 889 N.E.2d 1100, ¶33 (M.C.). The lack of an instruction allowed the jury to improperly consider the interrogator's assertions as fact; as the case was based upon eyewitness identification and not forensic evidence, the prejudice was outcome determinative, and the omission constituted ineffective assistance of counsel.

Counsel failed to call Officer Wloszek to testify in support of the motion for mistrial based upon witness intimidation by the state. Counsel did not object when Officer Wloszek read from a CAD report, naming other unknown eyewitnesses and what they had said in violation of *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.E.2d 177. Counsel did not object to leading questions eliciting out-of-court photo identification information.

On the basis of these instances of ineffective assistance, the fourth assignment of error has merit and should be sustained.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court take jurisdiction of this matter.

Respectfully submitted,



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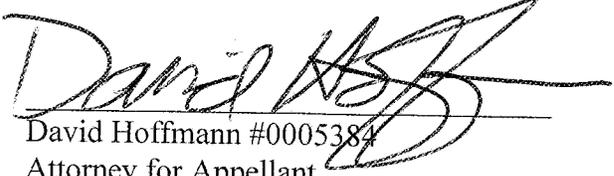
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was personally served upon Philip R. Cummings, Assistant Hamilton County Prosecuting Attorney, this 27th day of July, 2014.


David Hoffmann #0005384
Attorney for Appellant

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

ENTERED
JUN 27 2014

STATE OF OHIO, : APPEAL NO. C-130307
Plaintiff-Appellee, : TRIAL NO. B-1002888
vs. : JUDGMENT ENTRY.
ROBERT DAVENPORT, :
Defendant-Appellant. :



D106820599

This cause was heard upon the appeal, the record, the briefs, and arguments.

The judgment of the trial court is affirmed in part, reversed in part, and cause remanded for the reasons set forth in the Opinion filed this date.

Further, the Court holds that there were reasonable grounds for this appeal, allows no penalty and orders that costs are taxed under App. R. 24.

The Court further orders that 1) a copy of this Judgment with a copy of the Opinion attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App. R. 27.

To the clerk:

Enter upon the journal of the court on June 27, 2014 per order of the court.

By: 
Presiding Judge

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

ENTERED
JUN 27 2014

STATE OF OHIO, : APPEAL NO. C-130307
Plaintiff-Appellee, : TRIAL NO. B-1002888
vs. : *OPINION.*
ROBERT DAVENPORT, :
Defendant-Appellant. : **PRESENTED TO THE CLERK
OF COURTS FOR FILING**
JUN 27 2014

COURT OF APPEALS

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed in Part, Reversed in Part, and Cause
Remanded

Date of Judgment Entry on Appeal: June 27, 2014

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Philip Cummings*,
Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Office of the Hamilton County Public Defender, *David Hoffman*, *Christine Y. Jones*
and *Josh Thompson*, Assistant Public Defenders, for Defendant-Appellant.

Please note: this case has been removed from the accelerated calendar.

ENTERED

JUN 27 2014

FISCHER, Judge.

{¶1} Defendant-appellant Robert Davenport appeals his convictions, following a jury trial, for the aggravated murder of Lincoln Lewis, with an accompanying firearm specification, and having a weapon while under a disability.

{¶2} In eight assignments of error, he argues that (1) the trial court erred by granting the state's motion to withhold discoverable evidence until trial; (2) multiple instances of prosecutorial misconduct denied him a fair trial; (3) the trial court abused its discretion in denying his motion for a mistrial; (4) his counsel rendered ineffective assistance; (5) the trial court erred by denying his Crim.R. 29 motion for an acquittal; (6) and (7) his convictions were not supported by the sufficiency and weight of the evidence; and (8) that his sentences were contrary to law.

{¶3} Because the trial court failed to make the necessary findings to impose consecutive prison terms, we vacate the consecutive sentences. We remand this cause to the trial court to determine whether consecutive sentences are appropriate, and, if so, to make the necessary findings on the record. We affirm the trial court's judgment in all other respects.

A Murder for Sunglasses

{¶4} On the afternoon of April 12, 2010, Lincoln Lewis, an aspiring rapper, was walking to the store when Davenport and another man approached him near the intersection of Hickory and Harvey Streets in the Avondale area of Cincinnati. Davenport stepped in front of Lincoln, as if he was going to hug him, but then shot him in the abdomen. As Lincoln lay on the ground dying, Davenport took his Cartier sunglasses, went through his pockets, and took his cell phone. In his haste to flee from the scene, Davenport dropped Lincoln's cell phone. Agnes Williams, who had witnessed the shooting on her way back from the store, ran to Lincoln's aid. She picked up

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Lincoln's cell phone, which was lying on the ground next to his body, and comforted him until the police and medical personnel arrived on the scene.

{¶5} Minutes later, the police arrived and secured the scene, while medical personnel rushed Lincoln to the hospital. Lincoln died shortly after arriving at the hospital. An autopsy performed the following day by the deputy coroner revealed that Lincoln had died from exsanguination due to perforation of the right common iliac artery and vein, resulting from a gunshot wound to the abdomen.

{¶6} At the crime scene, Williams had given police Lincoln's cell phone. The police also had recovered a Wolf 9 mm Luger casing on the sidewalk, along with a white t-shirt, white leather jacket, a belt that Lincoln had been wearing, and a blue tooth headset. Medical personnel had removed Lincoln's t-shirt and jacket so that they could render aid to Lincoln at the scene. Police escorted Williams to an unmarked police car where she gave them a description of the two men who had perpetrated the crime and a brief account of the shooting.

{¶7} That night, police detectives called Williams at home and she provided them with a more detailed account of the shooting. Williams told police that she had been walking back from the store when she had seen Lincoln walking on the street. It was a nice day and she was admiring Lincoln's outfit. He was wearing jeans with a white leather jacket and t-shirt. She knew Lincoln through her son, who was supposed to meet Lincoln later that evening. She was planning to tell Lincoln that her son had plans and would not be able to meet him that night. As she was walking towards Lincoln, she saw two young men walking very close behind him. One man was wearing a yellow shirt and the other man was wearing a red shirt. She thought that the shorter of the two men, who was wearing a yellow shirt, was going to hug Lincoln, but instead he pressed a black gun in Lincoln's abdomen and shot him. Lincoln took his sunglasses off and handed them

over to the man with the yellow shirt. He then leaned into the man and slid down to the ground. The shooter then went through Lincoln's pockets and said, "I got that fool. I caught him slipping" before running through the park with the other man. She ran to Lincoln and tried to comfort him until police arrived.

{¶8} Greg Master, an uninterested bystander, also contacted police that night. He informed police that he had witnessed the shooting. He traveled to the police station where he was interviewed. Master told police that he had been walking to the store for a neighbor when he had seen two young men walking through the park. One of the men was wearing a yellow shirt and had tattoos on his neck. He looked to be 14 or 15 years old because he was so short. As the two men got closer to him, he saw the man in the yellow shirt pull out a black gun. He stepped into the street because he did not know what they were going to do. He watched as the two men approached another man on the next corner. They walked like they were going to go past him, but just as they walked past him, they turned around, and the man in the yellow shirt stuck the gun in his side and shot him. The man fell forward. The man in the yellow shirt then put the gun back down in his shorts. The men then took "glasses or something" off of him. They walked back through the park, laughing like nothing happened. Then they started running. A woman then went to the victim and told him that everything was going to be okay.

{¶9} That same night, police also interviewed Lincoln's 14-year-old cousin, Albert Lewis. He told police that he had been playing basketball in the park nearby, when he had heard gunshots and had seen two men bending down to take something from his cousin. He said the men were young and were wearing yellow and blue shirts. He told police the man in the yellow shirt had the gun.

{¶10} Roughly two weeks after Lincoln's murder, police separately showed Williams, Lewis, and Master a photo array, which included Davenport's photo. All three

witnesses identified Davenport as the shooter. Lewis told police he was 50 percent sure that Davenport was the shooter, while Master told police that he was 90 percent sure that Davenport was the shooter.

{¶11} Twenty-one days after Lincoln's murder, Davenport was arrested, advised of his *Miranda* rights, and interviewed by the police. In his first interview, Davenport told police that he had heard on the news that someone had "got shot with sunglasses." Davenport further stated that "word on the street was they tried to say two short people did it, two young boys. That's what I heard on the news. Two short boys did it about 15." Davenport, however, vehemently denied any involvement in the shooting. Police had also arrested Davenport's friend, Donte Martin, for a separate offense, and questioned him about Lincoln's murder.

{¶12} While Davenport and Martin were in custody, the police executed a search warrant for an apartment where they had been staying. In the search, the police recovered from a bedroom a yellow embroidered zip-up jacket, a plastic bag containing six Wolf 9 mm Luger cartridges, and a pair of Polo brand canvas shoes in a box. They also recovered from a bookshelf in a separate bedroom, a FC 9 mm plus JHP cartridge, one Wolf 9 mm Luger cartridge in a piece of plastic, and one CBS 45 caliber cartridge. The Wolf 9 mm Luger cartridges were the same type and brand as the casing that the police had recovered at the scene of Lincoln's murder.

{¶13} Following the search and the interviews, the police released Martin. Davenport, however, remained in custody. While Davenport was housed at the Hamilton County Justice Center, he made a series of telephone calls to his father and to Charae Henson, his former girlfriend and the mother of his son. All phone calls made by inmates are recorded and stored. Davenport's calls were recorded and played for the jury. In phone calls made the night of his arrest and the following day, Davenport can be

heard discussing his arrest with his father. His father said, "Teddy must be telling on you. Little Rob. So that's plain to see right there." Later on in the conversation, his father said, "Oh no, Little Rob, you weren't there for that." Davenport then replied, "I know." His father then said, "You wasn't there for that. Me, and you, and Charae was in my car with me. You wasn't there with that." Davenport then said, "I was with you." His father replied, "You was with me."

{¶14} In a later conversation between Davenport and his father, his father said, "You're going to get this goddam girl, Red, and she gonna be your goddam witness. You was with me." Later that same night, Davenport called Henson and said, "Hey you remember that day?" Henson said, "What day, Rob?" Davenport said, "That me, you, and my daddy went to get Montay from daycare when dude died. Yeah." Later in the same conversation Davenport said, "But you remember that day, though when me, you, my daddy went to get my son though, right?"

{¶15} Davenport called Henson back a little later, and said, "That's how you need to get my phone -- that's how you need to get my phone turned off baby. Do you hear me? The detectives got it. They using -- they trying to use my shit for evidence. I need my phone turned off." Davenport later said, "Because I was with you that day. Do you feel me? I really was, though, man." He later said again, "I was really right there next to you, though, bro. I really was, though." Henson finally said, "I know you wouldn't do it."

{¶16} In another conversation with his father, Davenport said in response to a question from his father about where Lincoln had been shot, "He was shot in his right kidney, right stomach. Because Teddy grabbed him with his left arm, and he shot him with the right." Davenport said later in the same conversation that he was going to need an alibi. His father replied, "Charae going to be your alibis. [sic] I'm going to get -- on

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that -- I'm going to get on that -- I'm, dad -- I'm going to get on that witness stand. We is going to say that we rode past there and you was with me."

{¶17} Later on in a three-way call among Henson, Davenport, and his father, Davenport said, "And Charae, but look my story is, bro, me and you went to pick up our son from daycare. You hear me?" In another call, Davenport asked Henson, "Did you see Teddy when he shot the dude? Henson replied, "No." Davenport said, "It was in his stomach, you hear me?"

{¶18} Davenport was interviewed again by police the following day. He told police that he had been at the scene of the murder and had possessed a gun, but that he had seen Martin, whose nickname is "Teddy," and another man, DeShaun, shoot and rob Lincoln. According to Davenport, he and the two men had walked with Henson to pick up his son from daycare. Lincoln had been wearing a pair of "Carties."

{¶19} Davenport and Henson had then crossed the street and had overheard Teddy and DeShaun talking about how they wanted a pair of Carties like Lincoln's, and how they were planning to rob the "guy up the street who was wearing Carties." Davenport said that Teddy had been wearing a yellow t-shirt with lions on it and that DeShaun had been wearing a white t-shirt, jeans, and red Polo shoes. Davenport and Henson had watched as Teddy and DeShaun robbed the guy. Davenport said that when the guy had started to struggle for the gun, Teddy had shot him in the stomach.

{¶20} Davenport told police that Teddy had grabbed the guy's glasses and had taken his wallet, while DeShaun had stood there looking. Then Teddy and DeShuan had taken off running through the park. Davenport and Henson then had walked to Henson's house. Davenport had stayed at Henson's house until the police had cleared the scene. During that time, Davenport and Henson had argued because she had told him that he should have stopped them from shooting and robbing the guy. He told

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police that Teddy had sold the sunglasses. Davenport also told police that they could contact Henson, who would confirm that he was with her at the time of the murder.

{¶21} The police, however, had already shown Lewis and Williams a photo array, which contained Donte Martin's photo. Neither of them had selected Martin's photo from the array. Following Davenport's interviews, Master was shown the same array with Donte Martin's photo, as well as an array that contained DeShaun Coleman's photo, but he did not identify either man as being involved with Lincoln's murder.

{¶22} In the meantime, the police interviewed Henson and DeShaun Coleman. They also obtained a search warrant for the contents of Davenport's cell phone and his cell phone records. The cell phone records showed that Davenport had made a series of phone calls and text messages both before and after the time of the murder, but none at the time of the murder. Police had also begun testing a number of items that they had recovered at the crime scene and in Davenport's apartment for finger prints and contact DNA. The police were unable to recover any fingerprints on any of the items, and only found Lincoln's DNA on the cell phone.

{¶23} Police, however, continued to monitor Davenport's phone calls at the jail. In those calls, Davenport had told his father that he had a gun the day of the murder and hid the gun in Henson's house. Davenport's father told Davenport that he had gone to Henson's house and picked up the gun. In another phone conversation, Davenport's father asked him, "What's up with DeShaun, bro?" Davenport had replied, "Man, he ain't have nothing to do with it. But you need to find DeShaun and tell DeShaun to tell these motherfuckers who really did this shit, bro?"

{¶24} In several phone calls with a woman named Rhonda, Davenport told Rhonda, when she was complaining that she did not have any money, that she should go get two of his "bangers" (guns) and sell them. Davenport also told Rhonda that she

should call Crimestoppers and tell them that he was not involved in the murder: "Tell them bitches he didn't do that, you bitches, and hang up on their ass, you got me." When Rhonda mentions in a later conversation that she knows one of the state's witnesses, Davenport said, "Next time you see her, Bro, call this number for real, Bro. This is what – I mean, I'm going to, I'm fittin' to write it in this letter for you tonight, Bro. I am fittin' to write you everything, fittin to write everything. Bro, that's dead. We are fittin' to put that to a cease, Bro. Ooh this dirty bitch, man. I don't even know this ho, but that's I bet that one of their witnesses, though." Rhonda then said, "Man, I hope she ain't." Later in the same conversation, Davenport said, "Man, when you see that broke bitch, motherfucking, give her broke ass four bands."

{¶25} Davenport later told Rhonda in another conversation, "Hey, though, but my people said if your grandma and your uncle come to court, they give them 200 apiece, and just say they ain't see nobody – I mean they couldn't see from where they were sitting there." Later on in the same conversation, Davenport said, "Tell JJ he can get some cheese. You hear me." Rhonda replied, "My people ain't going to come to court." Davenport then said, "Man, not for the money?"

Trial Court Proceedings

{¶26} Davenport was subsequently indicted for aggravated murder under R.C. 2903.01(B), felony murder under R.C. 2903.02(B), aggravated robbery under R.C. 2911.01(A)(1), and having a weapon while under a disability under R.C. 2923.13(A)(3). The aggravated-murder, felony-murder, and aggravated-robbery charges were each accompanied by a three-year-firearm specification. Davenport pleaded not guilty.

{¶27} Prior to trial, the state, fearing intimidation of its civilian witnesses, filed a motion seeking nondisclosure of those witnesses until trial. Davenport filed a motion

to compel the disclosure of all witness and a motion to suppress the eyewitness identification. The trial court denied both of Davenport's motions.

{¶28} Seven days prior to trial, the trial court held a hearing on and granted the state's motion for nondisclosure. On the first day of trial, the state disclosed the names and addresses of the civilian witnesses to Davenport's counsel. Davenport's counsel moved to dismiss the indictment, arguing that the state had violated his right to receive evidence against him and hampered his counsel's ability to adequately prepare his defense for trial. The trial court denied Davenport's motion to dismiss, but gave his counsel a one-month continuance to prepare for trial.

{¶29} Following the month-long continuance, Davenport's trial commenced before a jury. All three eyewitnesses to the shooting, Albert Lewis, Agnes Williams, and Greg Master, testified at trial. Although Williams and Master testified consistently with their statements to police, and stated they were 100 percent positive that Davenport had shot and robbed Lincoln, Lewis testified that he was less than 50 percent sure that Davenport had shot his cousin. The state also presented testimony from several police officers, an assistant coroner, three criminalists, a serologist, a Cincinnati Bell records custodian, Lincoln's mother and stepfather, an employee for the telephone service provider for the jail, and Detective Wloszek.

{¶30} Davenport presented testimony from a police officer, Carla Butler, the director of his son's daycare, and Henson. The officer testified that he had spoken with Williams the day of the murder, but that he had mistakenly written down in his notes that Williams had said the shooter was taller than the victim, when Williams had actually said that she was taller than the shooter. Butler testified that she had been employed with the daycare for only a year and two months. The normal procedure at the daycare was for parents to sign the children in and out on an attendance sheet.

Butler testified that the attendance records showed that Davenport's son had attended daycare the week of the murder. On cross-examination, Butler was asked about the difference between the attendance sheet for the week of the murder, which was blank for Davenport's son, and three other attendance sheets that the state had obtained where children, including Davenport's son, had been signed in and out, or if there was no signature, the word "out" had been written in place of the signature. Butler replied that she could not explain the discrepancy in the records.

{¶31} Henson testified that at the time of the shooting she had been a senior at Woodward High School. During that time, she was in the habit of taking her son to daycare every morning. On the day of the shooting, she rode the bus after she got out of school and arrived at her bus stop at approximately 4 p.m. When she had exited from the bus, Davenport had been across the street with his friends, Teddy, Rod, and DeShaun. When she reached the group, she asked Teddy and Rod if they knew her son's daycare teacher because she wanted to see him or her. The group then proceeded to the daycare.

{¶32} The normal procedure at the daycare was for parents to sign the children in and out, but she could not recall signing her son out that day. The group did not stay long because her son's teacher had already left for the day. After leaving the daycare center, they proceeded toward her home on Hickory Avenue. Soon after leaving, the group split up, with Teddy and DeShaun crossing to the other side of the street. Davenport was carrying their son and talking to Rod.

{¶33} Not long after, she and Davenport started to walk down Hickory, and were near her home when they heard a gunshot. She did not look back, but instead continued to walk toward her home. After the gunshot, Davenport took their son inside her home. He then handed their son to her and went up the street to see what had

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happened. Henson could not recall seeing Davenport the rest of the evening. She was contacted by the police, who came to her home two weeks later. Her father took her to the police station where she gave a statement.

{¶34} At the conclusion of the trial, the jury found Davenport guilty of all the charges and firearm specifications. The trial court imposed an aggregate prison sentence of 36 years to life. It merged the murder and aggravated robbery and their accompanying gun specifications into the aggravated murder and its gun specification; it imposed an indefinite prison term of life with parole eligibility after 30 years for the aggravated murder, a 36-month prison term for the weapons under disability offense, and a three-year prison term for the gun specification to the aggravated murder; and it ordered that the prison terms be served consecutively.

Certificate of Nondisclosure

{¶35} In his first assignment of error, Davenport argues that the trial court abused its discretion and violated his due-process rights by granting the state's certification of nondisclosure of the names and addresses of all the civilian witnesses it intended to call at trial. He claims that the state's certification lacked case-specific reasoning and that he was prejudiced by the state's use of the certification to hide exculpatory evidence from him in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

{¶36} The granting or overruling of discovery motions in a criminal case rests within the sound discretion of the trial court. *See State v. Parson*, 6 Ohio St.3d 442, 445, 453 N.E.2d 689 (1983). Crim.R. 16 governs discovery in criminal cases. Although Crim.R. 16(I) requires each party to provide to the opposing counsel a written witness list, Crim.R. 16(D) permits the prosecuting attorney to decline to

disclose to the defendant the names of witnesses as long as the prosecutor certifies that nondisclosure is for one of the five reasons enumerated in the rule.

{¶37} One of those enumerated reasons is if “[t]he prosecuting attorney has reasonable, articulable grounds to believe that disclosure will compromise the safety of a witness, victim, or third party, or subject them to intimidation or coercion.” Crim.R. 16(D)(1). Crim.R. 16(D)(5) provides that the state’s reasonable, articulable grounds for nondisclosure “may include, but are not limited to, the nature of the case, the specific course of conduct of one or more parties, threats, or prior instances of witness tampering or intimidation, whether or not those instances resulted in criminal charges, whether the defendant is pro se, and any other relevant information.” See *State v. Williams*, 1st Dist. Hamilton No. C-130277, 2014-Ohio-1526, ¶ 14-15; *State v. Hernandez-Martinez*, 12th Dist. Butler No. CA2011-04-068, 2012-Ohio-3754, ¶ 25.

{¶38} Ohio appellate courts, including this court, have held that “as long as the reason for the nondisclosure satisfies one of the factors listed in Crim.R. 16(D), an oral certification during a hearing before the parties is sufficient.” See *Williams* at ¶ 18, citing *State v. Hebdon*, 12th Dist. Butler Nos. CA2012-03-052 and CA2012-03-062, 2013-Ohio-1729 ¶ 49; see also *State v. Blake*, 2012-Ohio-3124, 974 N.E.2d 730, ¶ 18 (12th Dist.); *State v. Thompson*, 6th Dist. Lucas Nos. L-08-1208 and L-09-1214, 2011-Ohio-5046, ¶ 128; *State v. Collins*, 8th Dist. Cuyahoga No. 89529, 2008-Ohio-578, ¶ 58.

{¶39} During discovery, the state filed a motion for certification in support of its nondisclosure of several witnesses pursuant to Crim.R. 16(D). Although this initial filing was generic and did not provide any case-specific

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reasoning to justify the certification, a hearing on the certification was held before the presiding criminal judge seven days prior to trial. *See* Crim.R. 16(F).

{¶40} Two prosecutors and defense counsel were present at the hearing. The prosecutor provided details regarding the intimidation of state's witnesses by Davenport's family members. Detective Wloszek was sworn and testified that, as a lead investigator on Davenport's case, he was aware that Davenport, his family, and his friends had tried to identify the state's witnesses and contact them. Some witnesses were so concerned for their safety that they had contacted the Cincinnati police to report the contacts. Police squad cars had been dispatched to take aggravated-menacing reports in some instances.

{¶41} Because the detective's case-specific testimony was sufficient to justify the state's need for nondisclosure, we cannot say the trial court abused its discretion in finding that the prosecution had complied with Crim.R. 16(D) and had not abused its discretion by withholding the names of the state's witnesses until trial. *Williams*, 1st Dist. Hamilton No. C-130277, 2014-Ohio-1526, at ¶ 18-20. As a result, we find Davenport's first argument meritless.

{¶42} Davenport next argues that the nondisclosure violated his due-process rights under *Brady*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215. Under *Brady*, the prosecutor is obligated to disclose all material evidence favorable to the defense on the issue of guilt or punishment. "Evidence is 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." *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481.

{¶43} Here, however, the state disclosed the identities of the civilian witnesses at the beginning of the trial. Upon disclosure, Davenport sought and was granted a one-month continuance to review the witness list and prepare before his trial commenced. Because the state disclosed all the witnesses and favorable evidence to him prior to trial, there can be no *Brady* violation. See, e.g., *Hernandez-Martinez*, 12th Dist. Butler No. CA2011-04-068, 2012-Ohio-3754, at ¶ 21, citing *State v. Bradley*, 4th Dist. Scioto No. 1583, 1987 Ohio App. LEXIS 8824, *11 (Sept. 22, 1987). We, therefore, overrule his first assignment of error.

Prosecutorial Misconduct

{¶44} In his second assignment of error, Davenport argues that multiple instances of prosecutorial misconduct during the trial and closing arguments denied him a fair trial.

{¶45} In order to reverse a conviction based on prosecutorial misconduct, the alleged misconduct must have deprived the defendant of a fair trial. See *State v. Fears*, 86 Ohio St.3d 329, 332, 715 N.E.2d 143 (1999). The prejudicial effect of the alleged misconduct must be considered in the context of the entire trial, and not simply the immediate context in which the misconduct occurred. See *State v. Maurer*, 15 Ohio St.3d 239, 266, 473 N.E.2d 768 (1984).

{¶46} Davenport first claims that the prosecutor improperly elicited testimony about witness intimidation during his direct examination of Police Officer Marcus McNeil. He argues that the prosecutor was permitted to improperly elicit testimony from the officer, over objection, that there was a low level of cooperation from residents in the Bond Hill, Roselawn, and Avondale neighborhoods, and that “there are a lot of eyes and ears in the neighborhood.” But as Davenport himself points out, on cross-examination Officer McNeil testified that his role during the

investigation was limited to collecting evidence and that he had no personal knowledge of witnesses refusing to cooperate or being intimidated in Davenport's case. When the prosecutor tried on redirect to elicit additional testimony about witness intimidation, the trial court sustained defense counsel's objections to the testimony. We fail to see how the elicitation of these two statements denied Davenport a fair trial.

{¶47} Davenport next points to questioning by the prosecutor with respect to Agnes Williams during which she was asked if she wanted to testify at trial, if she knew she was a protected witness, and if she knew her identity in the community had been compromised. He argues such testimony was improper. Finally, Davenport argues that such improper witness-intimidation testimony reached "critical mass" when the state asked Williams about visits she had received from Davenport's father. But the record reflects that defense counsel objected to only part of these questions. The trial court sustained counsel's objection to the last question and it instructed the jury to disregard Williams's answer. We fail to see how the prosecutor's question and the witness's comment denied Davenport a fair trial. Further, any error that may have occurred in the admission of the other testimony and statements did not deny Davenport a fair trial.

{¶48} Davenport next alleges that the prosecutor improperly elicited victim-impact evidence from Lincoln's mother, Angela Lewis-Thiam, and his stepfather, Moustapha Thiam, about how they identified his body at the hospital. Davenport, however, did not object to any of this testimony. Thus, we review its admission for plain error. While we agree the testimony had no connection to the offenses and was, therefore, inadmissible, we cannot conclude that the testimony denied Davenport a fair trial given that the testimony was brief and not overly

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emotional, and that the trial court instructed the jury that sympathy should not sway its verdict. See *State v. Neyland*, ___ Ohio St.3d ___, 2014-Ohio-1914, ___ N.E.3d ___, ¶ 147-150.

{¶49} Davenport further claims the prosecutor committed misconduct by failing to redact evidence of gang membership from his statement to police, and by making a reference to a “known DNA report,” which he argues implied that he had previously come to the attention of law enforcement. We cannot conclude that either instance, even if improper, denied Davenport a fair trial.

{¶50} Finally, Davenport argues that he was deprived of a fair trial because, in closing argument, the prosecutor engaged in misconduct by: (1) “stating that the evidence relating to a robbery applied only to Davenport’s purpose in committing the homicide offenses, even though the state had to prove a robbery occurred to prove aggravated murder;” (2) stating that, if Davenport were to be acquitted, Donte Martin, his accomplice, would never be charged; (3) intimating that Henson was a liar by saying that she had “fake crocodile tears;” and (4) referring to the “climate of intimidation” to bolster Williams’s credibility.

{¶51} A prosecutor is afforded wide latitude in closing arguments. *State v. Benge*, 75 Ohio St.3d 136, 142, 661 N.E.2d 1019 (1996). A review of the record indicates that the prosecutor’s statement regarding Donte Martin was made in rebuttal to defense counsel’s arguments and was based upon the evidence at trial. The prosecutor’s characterization of Henson as lacking credibility was also based on the evidence in the record relating to her inconsistent statements at trial and in her phone conversations with Davenport. See *State v. Watson*, 61 Ohio St.3d 1, 10, 572 N.E.2d 97 (1991). The prosecutor’s comment referencing the climate of intimidation was also proper to rebut Davenport’s claims in closing that Williams had been

mistaken in her identification. Thus, we cannot conclude these remarks were improper. Furthermore, any misstatement of law the prosecutor may have made was corrected by the trial court, when it correctly instructed the jury on the law. *See State v. Bey*, 85 Ohio St.3d 487, 496, 709 N.E.2d 484 (1999). As a result, we overrule the second assignment of error.

Motion for a Mistrial

{¶52} In his third assignment of error, Davenport claims the trial court committed error by failing to grant his motion for a mistrial.

{¶53} The decision whether to grant a mistrial lies within the trial court's discretion. *See State v. Sage*, 31 Ohio St.3d 173, 182, 510 N.E.2d 343 (1987). An appellate court will not reverse a decision granting or denying a mistrial absent an abuse of discretion. *See State v. Johnson*, 2013-Ohio-2719, 994 N.E.2d 896, ¶ 24 (1st Dist.). "Mistrials need be declared only when the ends of justice so require and when a fair trial is no longer possible." *State v. Franklin*, 62 Ohio St.3d 118, 127, 580 N.E.2d 1 (1991).

{¶54} Shortly after the jury had retired to deliberate, Davenport's counsel orally moved for a mistrial pursuant to Crim.R. 33(A)(2). He argued that the prosecuting attorney had violated a separation order by directing Detective Wloszek, who had been a witness in the trial and the state's representative, to personally interview three defense witnesses who lived at the same residence: Henson, Henson's mother, Angie Henson, and Henson's grandmother, Mildred Byers, prior to their testimony at trial. Davenport's counsel then proffered Byers's statements to him. According to defense counsel, Byers had said that the officer had made statements that "Robert Davenport is a bad person" and that "he has four murder cases on him right now, pending or will be pending."

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{¶55} Davenport's counsel told the court that he had spoken with Detective Wlozek and that Detective Wlozek had admitted to him that he was one of the people who had been ordered to speak with the women at their home. Counsel claimed that Detective Wlozek had violated the separation order and that the state had sent Detective Wlozek to talk to the witnesses about Davenport's bad character in an attempt to intimidate them from testifying, and that they had failed to appear at trial, preventing counsel from calling them as witnesses.

{¶56} The prosecuting attorney told the court that she had not received a list of the defense's witnesses until voir dire had started. At that point, she asked Detective Wlozek and another detective to interview the witnesses to see what they had to say. She admitted that Detective Wlozek and the other detective had visited the three witnesses named on the list, but she stated that the detectives had done so prior to defense counsel's request for an order for separation of the witnesses, which had not been made until the end of voir dire. The prosecutor stated that if one of the witnesses had asked the detective a question about Davenport, he could answer the question truthfully without creating an ethical issue.

{¶57} The prosecutor further stated that all three defense witnesses had shown up to testify at the trial, but that defense counsel had not called them to testify, because defense counsel had requested a day's continuance to review the transcripts of Davenport's jail phone calls. The prosecutor had asked if the trial could proceed with the defense presenting testimony from these three witnesses. Defense counsel had said that he did not want to proceed, but wanted to review the transcripts from the phone calls. The prosecutor pointed out that Henson had testified at trial. The prosecuting attorney further stated that she had been prepared

to cross-examine the other two witnesses, but for reasons unknown to the state, they did not testify. After hearing counsels' arguments, the trial court denied the motion.

{¶58} Davenport argues that the trial court's failure to declare a mistrial resulted in a violation of his right to compulsory process. In all criminal prosecutions, a defendant has the constitutional right to compulsory process for obtaining witnesses in his favor. See Sixth Amendment to the U.S. Constitution; Article I, Section 10, Ohio Constitution. But to establish a violation of this right, the defendant must make a plausible showing of how the witness's testimony would be "both material and favorable to his defense." See *United States v. Alenzuela-Bernal*, 458 U.S. 858, 867, 102 S.Ct. 3440, 73 L.Ed.2d 1193 (1982).

{¶59} Based upon our review of the record, we cannot conclude that Davenport has made such a showing. Henson testified at trial and provided Davenport with an alibi. Although Angie Henson and Mildred Byers did not testify at trial, Davenport did not proffer their testimony for the record. Thus, neither the trial court nor this court could evaluate what prejudice, if any, Davenport had suffered from their failure to testify. As a result, we cannot conclude that the trial court abused its discretion in denying Davenport's motion for a mistrial. We, therefore, overrule his third assignment of error.

Ineffective Assistance of Counsel

{¶60} In his fourth assignment of error, Davenport maintains that he was denied the effective assistance of counsel based upon defense counsel's failure to object to: (1) victim-impact evidence in the form of the victim's mother's and stepfather's testimony; (2) the witness-intimidation evidence and other-acts evidence; (3) Detective Wloszek's testimony about a computer aided dispatch—a printout of the 911 calls and the officers that responded to the crime scene ("CAD

report”); and (4) leading questions relating to photo-identification information. He also argues defense counsel was ineffective for failing to call Detective Wloszek in support of the motion for a mistrial.

{¶61} To prevail on those arguments, Davenport “must show that his counsel’s representation fell below an objective standard of reasonableness” and that he was prejudiced by counsel’s deficient performance. *See Strickland v. Washington*, 466 U.S. 668, 687-688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Prejudice is demonstrated by a showing “that there is a reasonable probability that, but for the errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome.” *Id.* at 694. Both prongs must be met to demonstrate ineffective assistance of counsel. *Id.* at 697. It is presumed that a properly licensed attorney is competent and ineffective assistance cannot be based on debatable tactical decisions. *See State v. Bradley*, 42 Ohio St.3d 136, 142, 538 N.E.2d 373 (1989).

{¶62} Davenport first complains that defense counsel should have objected to the testimony of Lincoln’s mother and stepfather. He fails to identify, however, what parts of their testimony were objectionable. We cannot conclude that defense counsel was ineffective for failing to object to their testimony. As we stated in our resolution of the second assignment of error, their testimony was brief, and counsel may have tactically decided not to object to their testimony to minimize the jury’s attention to it. *See State v. Mundt*, 115 Ohio St.3d 22, 2007-Ohio-4836, 873 N.E.2d 828, ¶ 89-91. The trial court, moreover, instructed the jury that it should not let sympathy sway its verdict. As a result, it is unlikely the result of the proceeding would have been different had counsel objected and the testimony been excluded. *See id.*

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{¶63} Davenport also argues that his counsel was ineffective for failing to object to the witness-intimidation testimony. But as set forth in our resolution of the second assignment of error, much of this evidence was properly objected to and excluded during the trial. Other portions were admissible or did not rise to the level of plain error. Defense counsel cannot have been said to be ineffective for failing to object to those portions that were otherwise admissible. Furthermore, any failure by counsel to object to the remaining evidence is not outcome determinative, given the state's overwhelming evidence against Davenport.

{¶64} Davenport next argues that his counsel was ineffective for failing to object to police references to the "Midget killers" during his interrogation or to request a limiting instruction following those comments. But we cannot conclude that the references were inadmissible hearsay. Rather, they were designed to elicit a response from Davenport during his interrogation. Counsel's failure, moreover, to request a limiting instruction, may have been a matter of trial strategy. Counsel may have chosen not to object to the passing reference to avoid drawing the jury's attention to the reference. Moreover, we conclude that error, if any, in the admission of this testimony was harmless, given the state's overwhelming evidence of Davenport's guilt. *See State v. Williams*, 6 Ohio St.3d 281, 290, 452 N.E.2d 1323 (1983).

{¶65} Davenport next faults counsel for failing to call Detective Wloszek to testify in support of the motion for a mistrial based on the state's claimed witness intimidation. Counsel, however, was able to summarize the detective's statements in a way beneficial to Davenport. Thus, counsel's decision not to call Detective Wloszek may have been a matter of trial strategy. Davenport's claim, moreover, that this additional testimony would have benefited his motion is more suitable to

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postconviction relief, where additional testimony from the Detective Wloszek, could be presented. *See State v. Ushry*, 1st Dist. Hamilton No. C-050740, 2006-Ohio-6287, ¶ 43; *see also State v. Wallace*, 10th Dist. Franklin No. 08AP-2, 2008-Ohio-5260, ¶ 59. Thus, Davenport can demonstrate no prejudice from his counsel's inaction.

{¶66} Finally, based upon our review of the record, we cannot conclude that defense counsel's failure to object to Detective Wloszek's testimony regarding the CAD report and the leading questions regarding the photo identifications was ineffective or outcome determinative. We, therefore, overrule Davenport's fourth assignment of error.

Crim.R. 29, Sufficiency and Weight of the Evidence

{¶67} In his fifth assignment of error, Davenport contends that the trial court erred in overruling his motions for acquittals under Crim.R. 29. In his sixth and seventh assignments of error, Davenport argues that his convictions were supported by insufficient evidence and were contrary to the manifest weight of the evidence. We address these assignments together.

{¶68} The standard of review for the denial of a Crim.R. 29 motion is the same as the standard for sufficiency. *See State v. Bridgeman*, 55 Ohio St.2d 261, 381 N.E.2d 184 (1978), syllabus. In reviewing a challenge to the sufficiency of the evidence, this court must determine 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. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). In addressing a manifest-weight-of-the-evidence challenge, we must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses,

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and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *Id.* at 387.

{¶69} Three eyewitnesses identified Davenport as the shooter. Lewis testified that he was playing basketball when he heard a gunshot and then he saw “two guys kind of bent over” before they took off running through the park. Lewis testified that he did not know Davenport, but he picked him out of a lineup 13 days after the murder and was 50 percent sure that he was the shooter. Although Lewis could not initially recall the descriptions he had given police of the shooter and the accomplice, he did recall telling police on the day of the murder that the man with the gun had a yellow shirt.

{¶70} Master testified that he was walking up the street close to the entrance of the park when he saw Davenport and another man walk up to Lincoln. He saw Davenport shoot Lincoln and take glasses “or something” from Lincoln. He then heard Davenport laugh as he walked and then ran through the park. Master said he was so close to the shooting that he had to step out into the street because he did not want to get shot, and that when Davenport walked by him he was close enough that “they could have shaken hands.” He further stated that immediately after the shooting a lady came to Lincoln’s aid and was comforting him until the police arrived. He called police the night of the murder and was transported to the police station, where he told police what he had seen. Sixteen days later, he was shown a photo lineup containing Davenport’s photo, and he picked him out as the shooter. At the time he viewed the array, Master told police he was 90 percent certain that Davenport was the shooter. He testified that after seeing Davenport,

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who had a tattoo on his neck, in person at trial, he was 100 percent sure Davenport had shot Lincoln.

{¶71} Williams testified that she was crossing the street at the time of the murder. Her eyes were focused on Lincoln, whom she knew through her son. She was admiring Lincoln's outfit and wanted to say hello. As she watched Lincoln walk down the street, she saw two men approach him. She thought the man in the yellow shirt was going to embrace Lincoln, but instead he pulled out a gun and shot him in the stomach. She said the man in the yellow shirt took Lincoln's sunglasses, went through his pockets, and took his cell phone, but then dropped the phone on the ground. According to Williams, the man in the yellow shirt then said, "Caught him slipping. I got that fool," before running away through the park. Williams ran to Lincoln and tried to comfort him until police arrived. She gave police his cell phone, and was interviewed by police at the scene and by phone later that night. Twenty-one days later, she was shown a photo lineup, and she identified Davenport as the shooter. She testified at trial, that she was 100 percent positive that Davenport had shot Lincoln.

{¶72} Physical evidence recovered by the police supported Williams's, Master's, and Lewis's identifications. The deputy coroner testified that Lincoln had died from internal bleeding due to a gunshot wound to his abdomen. She testified that the soot around the bullet hole on Lincoln's t-shirt was consistent with a gun being placed against his t-shirt at the time he had been shot. A search of Davenport's apartment revealed ammunition like that recovered at the crime scene. Davenport's cell phone records showed that he had not made any cell phone calls or sent text messages during the time of the murder. But immediately after the murder, he had begun contacting his father and Henson.

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{¶73} The state also produced a series of recorded jail phone calls between Davenport and a number of individuals, including his father and Henson, following his arrest. In the calls, Davenport is heard discussing his possession of a gun the day of the murder and attempting to establish an alibi with his father and with Henson. Furthermore, Davenport stipulated to having a prior conviction for aggravated possession of drugs. When viewed in the light most favorable to the prosecution, this evidence could have convinced a reasonable trier of fact that Davenport had committed the offenses. Thus, the trial court did not err in overruling Davenport's Crim.R. 29 motion.

{¶74} Moreover, the jury, as the trier of fact, was in the best position to judge the credibility of the witnesses. Davenport gave two statements to police denying any involvement in the robbery and shooting death of Lincoln, and stating that Donte Martin had committed the murder. He also presented an alibi through testimony from Henson that he was with her and his son at the time of the shooting, but the jury was free to reject that testimony. *See State v. Antill*, 176 Ohio St. 61, 67, 197 N.E.2d 548 (1964). And based upon our review of the record, we cannot conclude that the inconsistencies in the testimony of the state's witnesses rendered their testimony so unreliable or unworthy of belief that the jury lost its way and created a manifest miscarriage of justice. *See Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541. We, therefore, overrule his fifth, sixth, and seventh assignments of error.

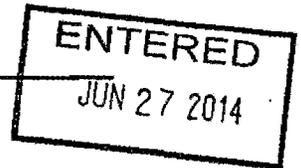
Consecutive Sentences

{¶75} In his eighth assignment of error, Davenport argues that the trial court erred in imposing consecutive sentences. The state properly concedes the error.

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{¶76} R.C. 2929.14(C) requires that trial courts make certain findings before imposing consecutive sentences. *State v. Alexander*, 1st Dist. Hamilton Nos. C-110828 and C-110829, 2012-Ohio-3349, ¶ 13 and 16. Under R.C. 2929.14(C)(4), the trial court must find that consecutive sentences are necessary to protect the public or to punish the offender. The court must also find that consecutive sentences are not disproportionate to the offender's conduct and to the danger the offender poses to the public. Finally, the court must find that at least one of the following applies: (1) the offender committed one or more of the offenses while awaiting trial or sentencing, while under a sanction imposed under R.C. 2929.16, 2929.17, or 2929.18, or while under postrelease control for a prior offense; (2) at least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the offenses was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct would adequately reflect the seriousness of the offender's conduct; or (3) the offender's criminal history demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender. *Alexander* at ¶ 15.

{¶77} Consecutive sentences imposed without these findings are clearly and convincingly contrary to law. See *State v. Green*, 1st Dist. Hamilton Nos. C-120269 and C-120270, 2013-Ohio-1508, ¶ 6, citing *State v. Cowins*, 1st Dist. Hamilton No. C-120191, 2013-Ohio-277, ¶ 36. Our review of the record demonstrates that the trial court failed to make the findings necessary to support consecutive sentences either orally at the sentencing hearing or on a sentencing-findings worksheet. See *Alexander* at ¶ 16-17; see also *State v. Watkins*, 1st Dist. Hamilton No. C-120567, 2013-Ohio-4222, ¶ 17. As a result, we sustain the eighth assignment of error.



Conclusion

{¶78} We, therefore, vacate the consecutive sentences and remand this cause to the trial court to determine whether consecutive sentences are appropriate, and if so, to make the necessary findings on the record. We affirm the trial court's judgment in all other respects:

Judgment affirmed in part, reversed in part, and cause remanded.

HENDON, P.J., and **DINKELACKER, J.**, concur.

Please note:

The court has recorded its own entry this date.