[Cite as *State v. Moore*, 2010-Ohio-2407.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-A-0024**
- vs -	:	
JASON MOORE,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2008 CR 194.

Judgment: Affirmed.

Thomas L. Sartini, Ashtabula County Prosecutor, and *Shelley M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047-1092 (For Plaintiff-Appellee).

John D. Lewis, Law Office of John D. Lewis, L.L.C., 34 South Chestnut Street, #200, Jefferson, OH 44047 (For Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Jason Moore appeals from the judgment of the Ashtabula County Court of Common Pleas, entered upon a jury verdict, sentencing him to a minimum of twenty-eight years imprisonment for murder, aggravated robbery, and felonious assault. The charges arose from the robbery and shooting of Earnest Maurice Boles, and death of Scott R. Doverspike, in the autumn of 2007. We affirm.

{¶2} May 16, 2008, the Ashtabula County Grand Jury returned an indictment against Mr. Moore, charging him with aggravated murder; murder; two counts of

attempted aggravated murder; attempted murder; aggravated robbery; and felonious assault. Various of the charges had attendant firearm specifications. Mr. Moore pleaded not guilty to all charges. June 24, 2008, Mr. Moore moved to bifurcate, which motion the trial court overruled. August 22, 2008, Mr. Moore moved to suppress evidence. December 17, 2008, following hearing, the trial court granted the motion in part. September 5, 2008, Mr. Moore moved for appointment of a forensic expert. The trial court appears not to have ruled on this motion. April 7 and April 13, 2009, Mr. Moore moved the court to dismiss the charges against him, on speedy trial grounds. The trial court denied these motions.

{¶3} Jury trial commenced April 14, 2009, the state dismissing the attempted aggravated murder and attempted murder charges. April 22, 2009, the jury found Mr. Moore not guilty of aggravated murder, but guilty of murder, aggravated robbery (with a firearm specification), and felonious assault (with a firearm specification). Thereafter, the trial court sentenced Mr. Moore to serve fifteen years to life imprisonment for murder; ten years for aggravated robbery, plus three years for the firearm specification; and, eight years for felonious assault, plus three years for the firearm specification. The sentences for aggravated robbery and felonious assault are concurrent to each other, and consecutive to the sentence for murder.

{¶4} The summary of facts is largely drawn from the transcript of trial.

{¶5} On the evening of November 15, 2007, Vanessa Baker left her apartment in the Bonniewood Estates in Ashtabula with her friend, Earnest Maurice Boles. They intended to celebrate Ms. Baker's upcoming birthday at a local tavern with another couple. From the record, it appears that Mr. Boles is a dealer in illegal drugs. Ms.

Baker noticed two young men sitting on a utility box as she and Mr. Boles crossed the street to his car. The taller of the two men, who was dressed in dark clothes with a hooded sweatshirt, with a white bandana obscuring his face, attacked Mr. Boles, wrapping one arm around his throat in a chokehold, while pressing a gun to his head, and demanding his possessions. The other man, who was small, remained in the background. Evidently, Mr. Boles broke his assailant's grip, for the next thing Ms. Baker recalled was the assailant shooting Mr. Boles in the stomach and hand. The assailants fled; Ms. Baker helped Mr. Boles back to her apartment, where she staunched his wounds, before rushing him to the Ashtabula County Medical Center. On the way there, they passed Detective Celletti of the Ashtabula Police Department, who was responding to the report of gunshots at Bonniewood. Surmising that the speeding vehicle might be that of the victim of the gunshots, Detective Celletti turned around and followed. At the hospital, Mr. Boles refused to cooperate with the detective or other police.

{¶6} Scott Doverspike and Jason Moore had been friends since childhood. By the time these events transpired, they were in their early twenties. Mr. Doverspike was rather small, being just over five feet tall, and slim. He was careful about his hygiene and appearance, except when drinking. Unfortunately, he seemed to have problems with both alcohol and drug abuse. When sober, he was helpful and cheerful. He liked to wear baggy clothes. Mr. Doverspike had a room at his mother, Debra's, house, but appears to have led a peripatetic life, often staying for periods, short or extended, with friends.

{¶7} Matt Roberts was another longtime friend of Mr. Doverspike and Mr. Moore. In the early afternoon of November 25, 2007, Mr. Doverspike and Mr. Moore

picked him up, to go get haircuts in Geneva. While returning to his home afterward, Mr. Roberts recalled Mr. Moore asking what bridge they should throw Scott (Doverspike) off. Mr. Roberts recollected that Mr. Doverspike took the comment as a joke, reminiscent of their boyhoods, when they often jumped and swam around a bridge on a local river. Mr. Roberts informed police, however, that he believed Mr. Moore was being serious. Mr. Roberts further recollected Mr. Doverspike telling him that Mr. Moore was responsible for shooting Mr. Boles.

{¶8} Debra Doverspike testified that, on or about November 26, 2007, her son told her he was scared, and moving to Florida as soon as he could gather the money. She testified he admitted to being involved in a recent attempt to rob a local drug dealer, who, he believed, was set on revenge.

{¶9} Brothers Michael and Andrew Hommes were other longtime friends of Mr. Doverspike and Mr. Moore. Michael Hommes testified that he and his girlfriend, Michelle Pryor, hosted a card party at their house in Kellogsville on the evening of November 26, 2007. Michael Hommes and Ms. Pryor evidently picked Mr. Doverspike up at Andrew Hommes' house between 8:00 p.m. and 9:00 p.m. Mr. Doverspike was wearing jeans and a blue hoodie. Mr. Moore and a girlfriend, Malinda Davis, came in her car. Michael Hommes stated he limited himself to drinking a few beers, as he had to go to work the next day, but that Mr. Moore brought a bottle of brandy for himself, Mr. Doverspike, and Ms. Davis. Eventually, Mr. Doverspike became extremely drunk, laying his head on the table, and banging his hand on it, while yelling at Mr. Moore that it was all Mr. Moore's fault. Mr. Doverspike then fell over, and began fighting with the family dog; whereupon Ms. Pryor, a teetoller, ordered the party to break up.

{¶10} Mr. Doverspike went outside, and fell in the mud, getting the shirt he wore under his hoodie wet. Mr. Hommes gave him a shirt to wear. Mr. Doverspike then left with Mr. Moore driving. Mr. Hommes believed they were going to the house of Roscoe Harris, with whom Mr. Doverspike often stayed. Mr. Hommes went to bed, but, perhaps an half hour later, Mr. Moore returned, and stood in the doorway to Mr. Hommes' bedroom, chatting. Both Mr. Hommes and Ms. Pryor testified that Mr. Moore dropped by over the next several days to play cards. By this point, Ms. Pryor was wondering what had happened to Mr. Doverspike.

{¶11} Mr. Roberts testified that, upon enquiry as to Mr. Doverspike's whereabouts, Mr. Moore said he had put him on a bus to Florida.

{¶12} November 29, 2007, Jeffrey Liskay was fishing the Ashtabula River, using waders. Near the Route 11 bridge, he noted some clothing in the underbrush; upon investigating, he discovered Mr. Doverspike's body. He was dressed in the clothes he wore to the party at Mr. Hommes' and Ms. Pryor's on November 26; one boot had fallen off, and was located several feet away. Mr. Liskay called 911; waited for officers to respond, then continued fishing.

{¶13} Detective Lieutenant Van Robinson and Detective Joseph Niemi responded to the scene. They noted that Mr. Doverspike's woven belt was badly frayed at one point, and that his pant tops were rolled over the belt at one point. This evidently raised the alarm that Mr. Doverspike had, possibly, been hoisted and thrown over the Route 11 bridge – a drop of some one hundred eighteen feet. Detective Niemi found Mr. Doverspike's cell phone, and called the last number dialed: Mr. Moore. Mr. Moore agreed to speak with the detectives at the Ashtabula Police Department. He spoke with

them again shortly thereafter, and agreed to go to Jefferson to make a statement. He spoke to them again, after he was imprisoned for a parole violation. Initially, he denied any knowledge of how Mr. Doverspike had died, insisting he had dropped him off near a cousin's house in Ashtabula following the party at Mr. Hommes' and Ms. Pryor's house. Eventually he seems to have relented, and agreed he was at the scene when Mr. Doverspike died, but that the incident was an accident.

{¶14} In April 2008, Mr. Adam Cook was nearing the end of a term of imprisonment at the Belmont Correctional Institution for aggravated vehicular homicide, when Mr. Moore arrived. They were acquaintances from childhood. Mr. Cook testified that Mr. Moore admitted to him that he and Mr. Doverspike committed crimes together, and that he had thrown Mr. Doverspike from the Route 11 bridge. Mr. Cook testified that Mr. Moore claimed Mr. Doverspike was so incapacitated with alcohol and drugs, that he was defenseless. Mr. Cook contacted his social worker with this information; and, letters were sent to Detective Niemi and the Ashtabula County Prosecutor. Mr. Cook offered to testify against Mr. Moore in return for placement outside of Ashtabula County when he was paroled, in December 2008. However, no favors were granted by the prosecutor's office, though, at the time of trial, Mr. Cook's probation officer was attempting to get his placement changed to Washington County, where Mr. Cook resides with his girlfriend, and attends college.

{¶15} Tony Severe also appeared for the state. Mr. Severe had been confined to the Ashtabula County Jail for a maximum, six month term for a first degree misdemeanor, from May through October 2008. He met Mr. Moore in late July of that year, when Mr. Moore was transferred to his cell block. Mr. Severe testified that Mr.

Moore informed him that he had gone to the Route 11 bridge with Mr. Doverspike, and that both of them were going to jump – but that Mr. Moore had, instead, simply pushed Mr. Doverspike off the wall. At the time of his testimony, Mr. Severe was still on probation, but had moved to Florida, and was gainfully employed.

{¶16} Again, the jury found Mr. Moore guilty of murder, aggravated robbery, and felonious assault. On appeal, he assigns six errors:

{¶17} "[1.] THE TRIAL COURT ABUSED ITS DISCRETION IN OVERRULING APPELLANT'S MOTION FOR MISTRIAL.

{¶18} "[2.] APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF HIS RIGHTS UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION.

{¶19} "[3.] THE TRIAL COURT ERRED IN DENYING PORTIONS OF APPELLANT'S MOTION TO SUPPRESS STATEMENTS.

{¶20} "[4.] APPELLANT'S CONVICTIONS ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶21} "[5.] PROSECUTORIAL MISCONDUCT RENDERED APPELLANT'S TRIAL FUNDAMENTALLY UNFAIR, IN VIOLATION OF THE OHIO AND UNITED STATES CONSTITUTIONS.

{¶22} "[6.] THE CUMULATIVE EFFECT OF ERRORS IN THE PROCEEDINGS BELOW DENIED APPELLANT HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL."

{¶23} By his first assignment of error, Mr. Moore challenges the trial court's denial of his motion for a mistrial. During the course of trial, the jury was played the

tape of a conversation Mr. Moore had with his mother while incarcerated. Mr. Moore told her he asked to take a test proving he was not lying to the police; that they administered a test similar to a polygraph test; that he was asked whether he was on the bridge with Mr. Doverspike; and, that the police told him he was lying. The test in question was a voice stress analysis test. The trial court had previously granted Mr. Moore's motion to suppress any reference to the test. On this basis, Mr. Moore's counsel moved for mistrial, asserting his own ineffectiveness in failing to note the brief reference to the test when reviewing the tape prior to trial.

{¶24} In *State v. Albanese*, 11th Dist. No. 2005-P-0054, 2006-Ohio-4819, at ¶22-26, we stated:

{¶25} "The granting or denying of a mistrial under Crim.R. 33 rests within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *State v. Williams* (1975), 43 Ohio St.2d 88, ***, paragraph two of the syllabus. An abuse of discretion 'connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.' *State v. Adams* (1980), 62 Ohio St.2d 151, 157, ***.

{¶26} "This court stated in *State v. Johnson* (Sept. 24, 1999), 11th Dist. No. 97-T-0227, 1999 Ohio App. LEXIS 4469, at *12-14:

{¶27} "'(t)he Supreme Court of Ohio has made the following observation regarding mistrials:

{¶28} "'"(i)n evaluating whether the declaration of a mistrial was proper in a particular case, this court has declined to apply inflexible standards, due to the infinite variety of circumstances in which a mistrial may arise. (***) This court has

instead adopted an approach which grants great deference to the trial court's discretion in this area, in recognition of the fact that the trial judge is in the best position to determine whether the situation in his courtroom warrants the declaration of a mistrial.'" (Citations omitted.) *State v. Glover* (1988), 35 Ohio St.3d 18, 19, ***.

{¶29} "'Thus, the decision whether to grant or deny a mistrial under Crim.R. 33 rests within the sound discretion of the trial court. Id.; *State v. Sage* (1987), 31 Ohio St.3d 173, 182, (***); *State v. Widner* (1981), 68 Ohio St.2d 188, 190, (***); *State v. Patterson* (May 22, 1998), 11th Dist. No. 96-T-5439, 1998 Ohio App. LEXIS 2289, at *19 (***). Mistrials should only be declared when the ends of justice so require and a fair trial is no longer possible. *State v. Franklin* (1991), 62 Ohio St.3d 118, 127, *** (***); *Patterson*, 1998 Ohio App. LEXIS 2289, ***.' (Parallel citations omitted.)"

{¶30} In this case, the trial court did not abuse its discretion in denying the motion for a mistrial, since, despite any error in admitting that portion of the audio referencing the voice stress analysis test, a fair trial remained possible. The reference to the test (which Mr. Moore did not identify by name) is brief; and, the reference merely states what was fully evident from the testimony of the police in this case: they did not believe Mr. Moore's story.

{¶31} The first assignment of error lacks merit.

{¶32} By his second assignment of error, Mr. Moore alleges he received ineffective assistance of counsel. In support, he advances three arguments. First, he recurs to counsel's failure to note the reference in the phone conversation

between himself and his mother to the voice stress analysis test. Second, he cites to counsel's failure to follow through on his motion for appointment of a forensic expert. Finally, he cites counsel's failure to move for acquittal under Crim.R. 29 on the aggravated murder and murder charges against him.

{¶33} In *State v. Tripi*, 11th Dist. Nos. 2005-L-030 and 2005-L-031, 2006-Ohio-1687, at ¶37-39, this court held:

{¶34} "Both the Ohio Supreme Court and this court have adopted the following two-pronged test articulated in *Strickland v. Washington* (1984), 466 U.S. 668, ***, to determine whether an accused has received ineffective assistance of counsel:

{¶35} "'First, a defendant must be able to show that his trial counsel was deficient in some aspect of his representation. (***) This requires a showing that trial counsel made errors so serious that, in effect, the attorney was not functioning as the "counsel" guaranteed by both the United States and Ohio Constitutions. (***)

{¶36} "'Second, a defendant must show that the deficient performance prejudiced his defense. *** This requires a showing that there is "a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." (***) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (***)' (Citations omitted.) *State v. Swick* (Dec. 21, 2001), 11th Dist. No. 97-L-254, ***, 2001 Ohio App. LEXIS 5857, at *4-5. See, also, *State v. Bradley* (1989), 42 Ohio St.3d 136, ***." (Parallel citations omitted.)

{¶37} "In applying the *Strickland* test, courts must always recall that properly-licensed counsel is presumed competent, and that trial counsel must be afforded

deference regarding trial strategy. *In re Roque*, 11th Dist. No. 2005-T-0138, 2006-Ohio-7007, at ¶11." *State v. Henderson*, 11th Dist. No. 2008-G-2867, 2009-Ohio-5207, at ¶11.

{¶38} Regarding Mr. Moore's first argument – that counsel was ineffective for failing to note Mr. Moore's reference to the voice stress analysis test in the phone conversation with his mother – we have already determined that the trial court did not err in failing to grant a mistrial based on the admission of the audio recording, since it did not deny Mr. Moore a fair trial. Similarly, counsel was not ineffective on this point, since the outcome of the trial was not deflected. Regarding his third argument – that counsel was ineffective for failing to move the trial court pursuant to Crim.R. 29 on the aggravated murder and murder charges – we choose to analyze this under his fourth assignment of error, challenging the manifest weight of the evidence used to convict.

{¶39} This leaves us to consider Mr. Moore's second argument: that counsel was ineffective for failing to follow through on his motion for appointment of a forensic expert. Counsel made the motion; the trial court demanded a fuller explanation of the type of expert desired; counsel never answered. Thus, the motion remained pending, and may be presumed overruled. *State ex rel. The V Cos. v. Marshall* (1998), 81 Ohio St.3d 467, 469. Mr. Moore argues that a forensic expert might have helped undermine the state's scientific evidence.

{¶40} The problem with this argument is that the state, while going to great lengths to try to develop scientific evidence relating Mr. Moore to Mr. Doverspike's death, failed to do so. Its witnesses were forced to admit, for instance, that attempts to recover Mr. Moore's DNA from Mr. Doverspike's clothing (especially the frayed belt,

whereby the state surmised Mr. Moore grabbed Mr. Doverspike while heaving him over the bridge), were entirely unsuccessful. Mr. Moore's counsel was eminently successful in pointing out to the jury the absence of scientific evidence against his client. We fail to see what more an expert could have done.

{¶41} The second assignment of error lacks merit, to the extent indicated.

{¶42} By his third assignment of error, Mr. Moore alleges that coercive questioning tactics by the police rendered certain statements of his involuntary. He particularly notes his eventual admission to having been on the Route 11 bridge with Mr. Doverspike. In support of this assignment of error, Mr. Moore notes that he was subjected to at least eight to ten hours of interrogation; and that the police lied to him regarding testimony expected from the state's forensic pathologist, and whether his DNA had been found on Mr. Doverspike's belt.

{¶43} "'Evidence of "police coercion or overreaching is necessary for a finding of involuntariness."' *State v. Fulton*, Clermont App. No. CA2002-10-085, 2003-Ohio-5432, ¶28, citing *Colorado v. Connelly* (1986), 479 U.S. 157, 163-164, ***, and *State v. Hill* (1992), 64 Ohio St.3d 313, 318, ***. When determining whether a statement was made involuntarily, the court must employ a 'totality of the circumstances' test. Id*.,* quoting *State v. Bays* (1999), 87 Ohio St.3d 15, 22, ***, and *State v. Clark* (1988), 38 Ohio St.3d 252, 261, ***. Under this test, the court should consider the following: (1) the age, mentality, and prior criminal experience of the individual making the statement, (2) the length, intensity, and frequency of the questioning, (3) whether the individual was physically deprived or mistreated, and (4) whether the individual was threatened or induced. Id., citing *State v. Lynch*, 98 Ohio St.3d 514, 522, 2003-Ohio-2284*,* ***. See

also *State v. Bohanon*, Cuyahoga App. No. 89443, 2008-Ohio-1087, ¶9, quoting *State v. Edwards* (1976), 49 Ohio St.2d 31, ***, paragraph two of the syllabus. '(T)he state carries the burden of proving the voluntariness of a confession by a preponderance of the evidence.' *Hill*, 64 Ohio St.3d at 318." *State v. Daniel*, 146 Ohio Misc.2d 9, 2008-Ohio-2050, at ¶13. (Parallel citations omitted.)

{¶44} The question of whether a statement was voluntary or coerced is a matter of law, which we review de novo. *State v. Comstock* (Aug. 15, 1997) 11th Dist. No. 96-A-0058, 1997 Ohio App. LEXIS 3670, at 6-7.

{¶45} Application of the totality of the circumstances test to the facts indicates we must find his statements voluntary.

{¶46} At the time the police questioned him, Mr. Moore was an adult in his early twenties, of normal intelligence, with no known substance abuse problem. His criminal record, and experience of the police and criminal justice system, were considerable. These facts all go toward a finding that his statements were voluntary.

{¶47} Mr. Moore indicates he was subjected to at least a total of eight to ten hours of questioning. It was not until late in this questioning that he admitted to being with Mr. Doverspike on the Route 11 bridge. This questioning was spread over three sessions, at each of which Mr. Moore was advised of his *Miranda* rights, which he declined to exercise. There is no assertion that Mr. Moore was abused in any fashion while being questioned. There is no indication the police threatened him or offered him any significant inducement. These factors indicate his statements must be considered voluntary.

{¶48} There is also the issue of the questioning officer lying to Mr. Moore about evidence held by the police.

{¶49} "The fact that an interrogating officer lies to a defendant during questioning does not necessarily make his statements involuntary, but is merely a factor bearing on voluntariness. See *State v. Carovillano*, Hamilton App. Nos. C-060658 and C-060659, 2007-Ohio-5459, ¶25; *State v. Winterbotham*, Greene App. No. 05CA100, 2006-Ohio-3989, ¶32; *State v. Hatcher* (Feb. 17, 2000), Franklin App. No. 99AP-460, 2000 Ohio App. LEXIS 535, ***, citing *State v. Cooey* (1989), 46 Ohio St.3d 20, 27, ***; *State v. Briggs* (Mar. 8, 1999), Butler App. No. CA98-06-127, 1999 Ohio App. LEXIS 862, ***; *Schmidt v. Hewitt* (C.A.3, 1978), 573 F.2d 794, 801; *Frazier v. Cupp* (1969), 394 U.S. 731, 739, ***. The statements are admissible when all other factors of voluntariness weigh in favor of a finding that the statement was made voluntarily, even if the police lied to the accused during the questioning. See *State v. Wiles* (1991), 59 Ohio St.3d 71, 81, ***; *State v. Ward* (July 31, 1996), Lorain App. No. 95CA006214, 1996 Ohio App. LEXIS 3253, ***." *Daniel* at ¶16. (Parallel citations omitted.)

{¶50} Mr. Moore does not point to any incriminating statement he made to the police as a result of the particular lies he was told. As the other factors under the totality of the circumstances test tend to indicate his statements were voluntary, we cannot find that these lies made the statements otherwise. Cf. *Daniel* at ¶16.

{¶51} The third assignment of error lacks merit.

{¶52} By his fourth assignment of error, Mr. Moore asserts his convictions are against the manifest weight of the evidence. Regarding whether he was involved in the robbery and shooting of Mr. Boles, he notes that Mr. Boles' girlfriend, Vanessa Baker,

could identify neither of the assailants – even though she knew both Mr. Moore and Mr. Doverspike very well. Mr. Moore points to the fact that Ms. Baker said the taller of the two assailants grabbed Mr. Boles; while Matt Roberts testified that Mr. Doverspike said Mr. Boles had grabbed him. Mr. Moore points to the fact that Ms. Baker said the shooter wore a white bandana to obscure his face; while Mr. Roberts testified Mr. Moore never wore bandanas. Mr. Moore further points to discrepancies in the testimony regarding the movements of the actors in this tragedy in the days prior to the party of November 26, 2007; and, evidence that Mr. Doverspike suffered from mental disorders that might have induced him to commit suicide. Mr. Moore questions the veracity of Mr. Cook, his fellow inmate at the Belmont Correctional Institute, who testified that Mr. Moore admitted the killing to him.

{¶53} When reviewing a claim that a judgment was against the manifest weight of the evidence, an appellate court must review the entire record, weigh both the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether in resolving conflicts, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that a new trial must be ordered. *State v. Martin* (1983), 20 Ohio App.3d 172, 175; see, also, *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387.

{¶54} "The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175. The role of the appellate court is to engage in a limited weighing of the evidence introduced at trial in order to determine whether the state appropriately carried its burden of persuasion. *Thompkins* at 390 (Cook, J., concurring). The reviewing court

must defer to the factual findings of the trier of fact as to the weight to be given the evidence and the credibility of the witnesses. *State v. DeHass* (1967), 10 Ohio St.2d 230, at paragraph one of the syllabus.

{¶55} When assessing witness credibility, "[t]he choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *State v. Awan* (1986), 22 Ohio St.3d 120, 123. "Indeed, the factfinder is free to believe all, part, or none of the testimony of each witness appearing before it." *Warren v. Simpson* (Mar. 17, 2000), 11th Dist. No. 98-T-0183, 2000 Ohio App. LEXIS 1073, at 8. Furthermore, if the evidence is susceptible to more than one interpretation, a reviewing court must interpret it in a manner consistent with the verdict. Id.

{¶56} Application of these principles to the record indicates the jury did not lose its way in convicting Mr. Moore of both the charges arising from the attack on Mr. Boles, and the death of Mr. Doverspike. Ms. Baker, who was present at the shooting of Mr. Boles, clearly established that the taller assailant shot him, while the smaller assailant held back from the fray. The record established that Mr. Moore was the approximate height and weight of the shooter, while Mr. Doverspike was much smaller. Mrs. Doverspike testified that her son told her of his assistance in the attempted robbery of a drug dealer, which had resulted in a shooting. Other participants at the party of November 26, 2007, where Mr. Doverspike was last seen, testified that he became angry, telling at Mr. Moore that "it" was his fault.

{¶57} From all this, a jury could reasonably infer that Mr. Moore and Mr. Doverspike sought to rob Mr. Boles; that Mr. Moore shot him; and, that Mr. Doverspike,

fearful of reprisal, blamed his friend for this. A jury could reasonably infer a motive for the murder of Mr. Doverspike: Mr. Moore feared he would "break," and inform about the shooting, to protect himself.

{¶58} Further, there is the testimony of not merely Mr. Cook, but of Mr. Severe, that Mr. Moore admitted killing Mr. Doverspike to them. The jury was made fully aware that Mr. Cook had sought the Ashtabula County Prosecutor's aid in having his probation transferred to Washington County – but that the prosecutor's office was not involved. Mr. Moore does not indicate why the jury could not believe Mr. Severe, who had completed his sentence, and was serving his probation in Florida. Mr. Severe had no particular reason to be grateful to Ohio law enforcement authorities, or to fear them.

{¶59} Mr. Moore's convictions are not against the manifest weight of the evidence. A determination that a conviction is not against the manifest weight of the evidence is dispositive regarding whether it is based on insufficient evidence. *State v. Hill*, 11th Dist. No. 2009-L-004, 2010-Ohio-709, at ¶15. Consequently, Mr. Moore's argument under his second assignment of error that counsel was ineffective for failing to move for his acquittal pursuant to Crim.R. 29, is baseless.

{¶60} The fourth and second assignments of error lack merit.

{¶61} By his fifth assignment of error, Mr. Moore alleges he was deprived of a fair trial due to prosecutorial misconduct. The basis for this assertion is the introduction of the recording of his conversation with his mother, in which Mr. Moore referred to the voice stress analysis test.

{¶62} "The conduct of a prosecutor during trial is not grounds for error unless it deprives a defendant of a fair trial. *State v. Maurer* (1984), 15 Ohio St.3d 239, 266, ***. A prosecutor is encouraged to advocate strongly and even vehemently for a conviction. *State v. Draughn* (1992), 76 Ohio App.3d 664, 671, ***. The test for prosecutorial misconduct is whether the alleged [conduct] was improper and, if so, whether it prejudicially affected the substantial rights of the defendant. *State v. Smith* (2000), 87 Ohio St.3d 424, 442, ***, citing *State v. Smith* (1984), 14 Ohio St.3d 13, 14, ***; see, also, *State v. Lott* (1990), 51 Ohio St.3d 160, 165, ***." *State v. Wright* (Mar. 29, 2002), 11th Dist. No. 2000-P-0128, 2002 Ohio App. LEXIS 1497, at 20-21. (Parallel citations omitted.)

{¶63} It appears from the record that the prosecutor's failure to notice Mr. Moore's brief reference to the voice stress analysis test was, like that of defense counsel, inadvertent. Certainly, more care should have been taken. But we have already determined that this error did not deprive Mr. Moore of a fair trial, and deem it harmless.

{¶64} The fifth assignment of error lacks merit.

{¶65} By his sixth assignment of error, Mr. Moore contends that he is entitled to the benefit of the "cumulative error" doctrine, first adopted in Ohio by *State v. DeMarco* (1987), 31 Ohio St.3d 191, at paragraph two of the syllabus: "Although violations of the Rules of Evidence during trial, singularly, may not rise to the level of prejudicial error, a conviction will be reversed where the cumulative effect of the errors deprives a defendant of the constitutional right to a fair trial." "However, in order even to consider whether 'cumulative' error is present, we would first have to find that multiple errors

were committed in this case." *State v. Goff* (1998), 82 Ohio St.3d 123, 140. They were not. Consequently, the doctrine does not apply.

{¶66} The sixth assignment of error lacks merit.

{¶67} The judgment of the Ashtabula County Court of Common Pleas is affirmed. Appellant is assessed costs herein taxed. The court finds there were reasonable grounds for this appeal.

MARY JANE TRAPP, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.