[Cite as *State v. King*, 2010-Ohio-4844.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Julie A. Edwards, P.J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 08-CA-335
MAURICE KING, III	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Richland County Court of Common Pleas Case No. 2008-CR-374D
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	September 21, 2010

APPEARANCES:

For Plaintiff-Appellee:

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Delaney, J.

{¶1} Defendant-Appellant, Maurice King, III, appeals from his convictions in Richland County, Ohio, for attempted receiving stolen property, attempted unlawful possession of a dangerous ordinance, possession of criminal tools, dereliction of duty and failure to report a crime. The State of Ohio is Plaintiff-Appellee.

{¶2} In 2007 and early 2008, Appellant was a police officer in the town of Bellville in Richland County, Ohio. In November, 2007, an informant for the Mansfield Police Department named Tommy Thompson informed Detective Eric Bosko that Appellant was involved in purchasing various stolen items. As a result of this tip, Detective Bosko initiated an investigation.

{¶3} Detective Bosko arranged for Thompson to call Appellant in December, 2007, and offer to sell him stolen crossbows. Thompson called Appellant, who agreed to look at the bows; however, Detective Bosko was unable to procure any crossbows in the police department's evidence room for Thompson to show Appellant.

{¶4} Thompson then contacted Appellant again on January 8, 2008, and informed Appellant that he had several stolen firearms that he would be able to sell Appellant. Appellant and Thompson arranged to meet at Appellant's home on January 10, 2008, so that Appellant could examine the firearms.

{¶5} On January 10, 2008, Thompson and an additional informant, James Soles, met with Mansfield police officers and Bureau of Alcohol, Tobacco, and Firearms agents, at a Wal-Mart that was close in proximity to Appellant's house. The informants were fitted with recording devices, and were given a .40 caliber Glock pistol, a 12-gauge shotgun, a semi-automatic SKS assault rifle, and a fully automatic M-16 assault rifle

from the Mansfield Police department evidence room. Thompson and Soles then drove to Appellant's home on Possum Run Road, which is located in a rural part of Richland County. Thompson and Soles were followed by police officers and ATF agents, who videotaped the meeting from a distance.

{¶6} Upon arriving at Appellant's house, Thompson introduced Soles as "Chicago," a man who had stolen the guns from a contractor in Cleveland. Appellant put on a pair of gloves and inspected the guns. Appellant negotiated a price of seven hundred dollars for the guns and used his cell phone to make several phone calls. The calls were placed to his grandmother and to a friend who lived in the Rosalind area of Mansfield. No one answered the phone on either of the calls, so Appellant told the informants to return at 2:00 a.m. to complete the deal. The informants then left Appellant's home around 4:00 p.m.

{¶7} At 4:31 p.m., Appellant telephoned his friend, Keith Porch, a police officer with the Metrich Drug Enforcement Task Force. Appellant told Porch that Thompson and an unknown Hispanic man had been at his residence attempting to sell him stolen guns. He indicated to Porch that he made the men leave his residence and that the men stated that they were going to go to Mansfield to attempt to sell the guns. Appellant provided Porch with a vehicle description, but stated that he did not know the license plate number. He also failed to advise Porch that he had scheduled the meeting or that he told the suspects to return to his house in the middle of the night.

{¶8} Twenty minutes later, Thompson phoned Appellant's cell phone, while in the presence of Detective Chad Brubaker, and left a message for him. Subsequently, Appellant returned Thompson's call and tried to negotiate the purchase of only the

Glock handgun. Thompson told Appellant he would sell him the handgun for five hundred dollars.

{¶9} After this phone call, Appellant again called Porch and informed him that Thompson had reduced the asking price for the guns. He informed Porch that he did not know Thompson's location; however, Thompson had told Appellant previously that he was at home. Appellant omitted to give Porch Thompson's cell phone number, which he had in his possession. He also did not tell Porch that he attempted to make a second transaction with Thompson for only the Glock handgun.

{¶10} At 6:09 p.m., Appellant called Thompson and informed him that his friend who was interested in the guns was out of town and would not return until January 31, 2008, and that he would call Thompson when his friend was available to complete the transaction. Two minutes later, Thompson called Appellant back to confirm the details.

{¶11} At 6:18 p.m., Appellant called Thompson back, sounding angry and questioning Thompson as to whether he told Chicago Appellant's name or that Appellant was a police officer. Thompson assured him that he had not. Thompson also informed Appellant that Soles had previously been arrested for selling crack cocaine, but that he did not have any current charges pending. Appellant stated that he would check Soles' record on public access, but not using his official access to the records database.

{¶12} Thompson called Appellant several additional times over the next few days, attempting to complete the sale of the guns. On January 13, 2008, Thompson's call went directly to Appellant's voicemail. On January 14, 2008, Thompson left two

additional messages on Appellant's voicemail. Appellant failed to report these calls to his friend, Porch.

{¶13} On January 15, 2008, authorities executed a search warrant on Appellant's residence on Possum Run Road. No stolen guns were identified. Appellant informed police that there was no stolen merchandise in his house; however, electronic equipment, a Razor electric scooter, and an Ohio driver's license belonging to Dionne Goodwin were photographed and seized.

{¶14} Following the search of his home, Appellant gave a statement to Detective Eric Bosko, and stated that he did not have a reason why he agreed to buy stolen crossbows in December, 2007. He admitted that he had failed to report any of this suspicious or illegal activity to Chief Ron Willey of the Bellville Police Department. He also stated that he did not tell Detective Porch the whole story for fear of his family's safety. He also admitted that he scheduled the date, time, and location of the meeting regarding the stolen firearms, and that he failed to notify any law enforcement agency of the meeting.

{¶15} As a result of the investigation, Appellant was charged with one count of attempted receiving stolen property, a misdemeanor of the second degree, one count of possessing criminal tools, a misdemeanor of the first degree, and one count of dereliction of duty, a misdemeanor of the second degree, relating to the December, 2007, attempt to purchase stolen crossbows. He was also charged with three counts of attempted receiving stolen property, felonies of the fifth degree, one count of attempted unlawful possession of a dangerous ordinance, a misdemeanor of the first degree, one count of possessing criminal tools, a felony of the fifth degree, one count of dereliction

of duty, a misdemeanor of the second degree, and one count of failure to report a crime, a misdemeanor of the fourth degree, relating to the January, 2008, attempt to purchase stolen guns. Appellant was also charged with one count of receiving stolen property, a misdemeanor of the first degree, relating to the driver's license discovered in his home on January 15, 2008.

{¶16} Appellant was initially tried on September 4 through September 11, 2008. During that trial, Appellant took the stand in his own defense. The trial concluded with the jury acquitting Appellant of the misdemeanor charges relating to the attempt to purchase the stolen crossbows and the possession of the stolen driver's license. The jury was unable to reach a verdict on the remaining charges.

{¶17} Appellant was tried a second time on December 11, 2008, through December 18, 2008, on the remaining charges related to the attempted possession of the guns. Appellant did not take the stand in the second trial; however, several of Appellant's statements were used when the defense called Keith Porch to the stand in Appellant's case in chief. Appellant was found guilty of three counts of attempted receiving stolen property; one count of attempted unlawful possession of a dangerous ordinance; one count of possessing criminal tools; one count of dereliction of duty; and one count of failure to report a crime. He was sentenced to twenty-two months in prison.

{¶18} Appellant now appeals, raising five Assignments of Error:

{¶19} "I. THE TRIAL COURT ERRED WHEN IT DENIED MR. KING HIS RIGHTS TO A FAIR TRIAL AND DUE PROCESS OF LAW BY PERMITTING

TESTIMONY OF ALLEGED PRIOR BAD ACTS EVIDENCE CONTRARY TO THE UNITED STATES AND OHIO CONSTITUTIONS.

{¶20} "II. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT MR. KING'S CONVICTIONS AND SAME WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶21} "III. THE TRIAL COURT'S FAILURE TO ALLOW THE DEFENSE TO CROSS EXAMINE THE INVESTIGATING OFFICER REGARDING SPECIFIC ERRORS IN HIS INVESTIGATION DEPRIVED MR. KING OF A FAIR TRIAL, CONTRARY TO THE UNITED STATES AND OHIO CONSTITUTIONS.

{¶22} "IV. THE PROSECUTOR'S MISCONDUCT DEPRIVED MR. KING OF A FAIR TRIAL, CONTRARY TO THE UNITED STATES AND OHIO CONSTITUTIONS.

{¶23} "V. THE CUMULATIVE EFFECTS OF EVIDENCE ADMITTED IN VIOLATION OF THE EVIDENCE RULES; RULES OF CRIMINAL PROCEDURE AND WELL ESTABLISHED PRINCIPLES OF LAW DEPRIVED MR. KING OF A FAIR TRIAL, CONTRARY TO THE UNITED STATES AND OHIO CONSTITUTIONS."

I.

{¶24} In his first assignment of error, Appellant argues that the trial court erred by permitting testimony of prior bad acts in contravention to Evid. R. 404. We disagree.

{¶25} Extrinsic acts may not typically be used to suggest that the accused has the propensity to act in a certain manner. Evid.R. 404; *State v. Smith* (1990), 49 Ohio St.3d 137, 140, 551 N.E.2d 190. However, there are exceptions. Evid.R. 404(B) allows such evidence where it is offered to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Additionally, R.C. 2945.59

provides, “In any criminal case in which the defendant's motive or intent * * * is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant.”

{¶26} The admission or exclusion of evidence rests within the sound discretion of the trial court. Moreover, a determination as to whether evidence is unfairly prejudicial is left to the sound discretion of the trial court and will be overturned only if the discretion is abused. *State v. Robb* (2000), 88 Ohio St.3d 59, 68, 723 N.E.2d 1019. “As a legal term, ‘prejudice’ is simply “[d]amage or detriment to one's legal rights or claims.” Black's Law Dictionary (8th Ed.1999) 1218.

{¶27} At trial, Tommy Thompson testified that Appellant had previously dealt in stolen property. Additionally, another witness, Larry Davis, testified that he had previously sold stolen goods to Appellant, both directly and through Appellant’s father, on numerous occasions. Appellant admitted to authorities that he had met with Thompson and negotiated a price for the firearms, but he claimed that he did so as part of his own sting operation. Accordingly, Appellant’s intent was not only relevant, but it became the focus of the State’s case.

{¶28} It is fair to say that all relevant evidence is prejudicial. That is, evidence that tends to disprove a party's rendition of the facts necessarily harms that party's case. Accordingly, the rules of evidence do not attempt to bar all prejudicial evidence - to do so would make reaching any result extremely difficult. Rather, only evidence that

is unfairly prejudicial is excludable." *State v. Crotts* (2004), 104 Ohio St.3d 432, at ¶23, 820 N.E.2d 302.

{¶29} In determining whether the admission of other acts evidence is unduly prejudicial, we must consider whether the evidence is offered for a proper purpose, ie., whether it is relevant; whether, when engaging in a 403 balancing, the probative value of the evidence substantially outweighs any potential for unfair prejudice; and whether the jury, upon request, is instructed that the evidence is only to be considered for the proper purpose for which the evidence was admitted. *Huddleston v. United States* (1988), 485 U.S. 681, 108 S.Ct. 1496.

{¶30} First, Appellant objects to the admission of evidence related to Appellant's previous attempt to purchase stolen crossbows from Thompson. Initially, the trial court ruled that the testimony would be excluded at Appellant's second trial, but upon reconsideration, the court determined that although Appellant was acquitted of the charges related to the crossbows, the evidence was still relevant as a prior bad act under Evid. R. 404(B). In so ruling, the Court stated that the offer to purchase the crossbows occurred close in time to the offer to purchase the stolen guns at issue in the second trial. Moreover, the offer to purchase the bows involved the same person, Tommy Thompson, and that the testimony involved a prior dealing in stolen property, which was the offense at issue in the second trial. Accordingly, the court determined that the other act was not too remote, that it was supported by substantial proof, and that it was relevant to establish Appellant's intent to purchase stolen property in the present case.

{¶31} Moreover, Appellant's offer to purchase the stolen crossbows was important background information to the present case, as it established how the police first became aware that Appellant was dealing in stolen property.

{¶32} Additionally, when the prosecutor introduced this evidence at trial, the trial court interrupted the direct examination of Tommy Thompson to give the following instruction:

{¶33} "Ladies and gentlemen, I have an important instruction I need to give you about this evidence.

{¶34} "Sometimes evidence comes in for only a limited purpose, and this is the type of evidence we're talking about here. Now, you have heard that the main disputed issue in this case is Mr. King's intention or motive when he interacted with Mr. Thompson and Mr. Soles at the time of this transaction took place.

{¶35} "Now, Mr. King, as you have heard, contends he intends to have these fellows arrested for dealing in stolen guns when he could safely do so, and you heard the prosecutor contends that he intended to arrange the purchase of these stolen guns. That's where this information comes from, this evidence about prior dealings between this witness and other witnesses who may testify, or the defendant. He's not charged with those offenses. He's charged with the offense of those guns that we heard about on January 8th.

{¶36} "So this evidence doesn't come in to prove that he did what he did on January 8th. It comes in for the question as to whether it relates to what his intention was at the time he dealt with Mr. Thompson and Mr. Soles on January 8th. So it's a limited purpose evidence. It's not offered to prove Mr. King had bad character. It's

offered for only the issue of what his intention o[r] motive was when he dealt with Mr. Thompson or Mr. Soles. With that limiting instruction you can proceed."

{¶37} Within these parameters, we do not find that the trial court abused its discretion in allowing the prosecution to elicit testimony regarding Appellant's prior attempt to purchase stolen crossbows.

{¶38} Appellant next argues that it was error for the trial court to allow the prosecutor to reference prior acts involving Tommy Thompson, Larry Davis, Joshua Conley, and Rebekah Leicy in his opening statement, despite the trial court's ruling that only two witnesses would be allowed to testify to these matters.

{¶39} We would note that Appellant failed to object to the prosecutor's opening statement, and therefore, we review this claim under a plain error standard of review as well as an abuse of discretion standard of review. Pursuant to Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." The rule places several limitations on a reviewing court's determination to correct an error despite the absence of a timely objection at trial: (1) "there must be an error, i.e., a deviation from a legal rule," (2) "the error must be plain," that is, an error that constitutes "an 'obvious' defect in the trial proceedings," and (3) the error must have affected "substantial rights" such that " the trial court's error must have affected the outcome of the trial." *State v. Morales*, 10th Dist. Nos. 03-AP-318, 03-AP-319, 2004-Ohio-3391, at ¶19, quoting *State v. Barnes* (2002), 94 Ohio St.3d 21, 27, 759 N.E.2d 1240; *State v. Gross*, 97 Ohio St.3d 121, 776 N.E.2d 1061, 2002-Ohio-5524, ¶ 45. The decision to correct a plain error is discretionary and should be made "with the utmost caution, under exceptional circumstances and only to prevent a

manifest miscarriage of justice." *Barnes*, supra, quoting *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph three of the syllabus.

{¶40} We find no plain error in the prosecutor's brief mention of Conley and Leicy during opening statements. It was an isolated incident. Moreover, the trial court instructed the jury that opening statements and closing arguments are not evidence to be considered by the jury. As such, we cannot say that a substantial right of the accused was affected.

{¶41} Next, Appellant complains that it was error for the trial court to admit testimony by Thompson regarding prior dealings that he had with Appellant regarding stolen property because the prior dealings were too remote in time to the offenses charged at trial. Specifically, Appellant claims that Thompson testified that he had been selling stolen property to Appellant since they were teenagers. Again, we would note that no objection was made at trial to this testimony, and thus we review the statements under a plain error standard of review.

{¶42} While Thompson did in fact mention that he had sold stolen items to Appellant in the past, such statements were merely part of the background between Appellant and Thompson. Thompson testified that he had known Appellant since they were both approximately seventeen years old because they both grew up in the Little Kentucky area of Mansfield. They both resided in that area until they were approximately 21 years old. During the time that the two lived in the same neighborhood, Thompson sold Appellant "different types of stereos and speakers and amplifiers and stolen equipment."

{¶43} Thompson additionally testified that he had resumed communicating with Appellant within the past two to three years and that he had sold stolen property to him, including a shotgun, stereos, and car accessories, on two or three occasions leading up to the offenses in the present case. After this testimony, the trial court gave the limiting instruction discussed in paragraphs 33-36, infra.

{¶44} After the limiting instruction, the prosecutor inquired of Thompson as to how the relationship between Thompson and Appellant progressed from Thompson giving Appellant tips regarding drug deals to selling him stolen property. Thompson responded that he had previously stated in his testimony that he knew Appellant from the "old neighborhood" and that they had previously "did deals on that stuff." At that point, trial counsel finally objected to other acts beyond the two year period specified by the court. The court sustained the objection, but noted that "I think he testified about that in passing," and ordered the prosecution not to go into details of other acts which occurred outside of the past two years.

{¶45} Appellant additionally argues that it was error for the court to allow Thompson to testify because Thompson's testimony was uncorroborated and that it fell short of the substantial proof necessary to show that Appellant committed the prior acts. See *State v. Henderson* (1991), 76 Ohio App.3d 290, 601 N.E.2d 596. We reject this argument, as have other Ohio courts. See, e.g., *State v. Wright*, 4th Dist. No. 00CA39, 2001-Ohio-2473; see also *State v. Sieng* (Dec. 30, 1999), 10th Dist. No. 99AP-282. We, like the courts in *Wright* and *Sieng*, do not believe that the substantial proof requirement necessitates that independent evidence corroborate other acts testimony. Instead, we believe that the substantial proof requirement is satisfied if at least one

witness who has direct knowledge of the other act can testify to the other act. The jury may then fulfill its duty and evaluate the witness's testimony and credibility. A jury may, of course, choose to believe all, part or none of the testimony of any witness who offers testimony.

{¶46} "Generally, the weight to be given to the evidence and the credibility of witnesses are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus. * * * * Thus, while the state's only proof of the [other act] was not overwhelming and consisted solely of testimony of the Thompson, the testimony was admissible without corroboration. See *State v. Myles* (Sept. 18, 1980), 2nd Dist. No. CA 6507, (rejecting defendant's argument that similar acts cannot be introduced based solely on uncorroborated testimony of a co-defendant)."

{¶47} For these same reasons, we also reject Appellant's argument that it was error for the trial court to admit the testimony of Larry Davis, Jr. Based on the evidence properly before us in the record, Davis' testimony was that on one occasion in December, 2006, he sold a stolen Toshiba laptop to Appellant as well as some tools that he stole from Wal-Mart. According to Davis, this sale took place at Appellant's father's house. Davis also testified that on two to three other occasions, he sold stolen tools to Appellant through Appellant's father. On all of these occasions, Davis stated that Appellant negotiated the price for the stolen items.

{¶48} The jury was able to judge the credibility of the witnesses, and accordingly, we find that it was well within their province to determine what weight to give the testimony of both Thompson and Davis. Moreover, in addition to the instruction

previously given to the jury, the trial court, during Davis' testimony, again instructed the jury, "Excuse me, folks, again, this is some of the evidence that comes in for a limited purpose to determine what Mr. King's intention was when he was dealing with Mr. Thompson, Mr. Soles. It all comes in on that question of intention, plan, motive. It doesn't come in to prove character. Be careful you keep that distinction."

{¶49} Juries are presumed to follow the instructions of the trial court. *State v. Ahmed* (2004), 103 Ohio St.3d 27, 42, 813 N.E.2d 637. As such, we assume that the jury followed the instructions that the trial court gave them regarding the limited purpose of the bad acts evidence as well as the instructions that opening statements are not evidence.

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

II.

{¶51} In his second assignment of error, Appellant argues that his convictions were not supported by sufficient evidence and that his convictions were against the manifest weight of the evidence.

{¶52} When reviewing a claim of sufficiency of the evidence, an appellate court's role is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492. Contrary to a manifest weight argument, a sufficiency analysis raises a question of law and does not allow the court to weigh the evidence. *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717, 175. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, "any rational trier of fact could have found the

essential elements of the crime proven beyond a reasonable doubt." *State v. Thompkins,* 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541.

{¶53} Conversely, when analyzing a manifest weight claim, this court sits as a "thirteenth juror" and in reviewing the entire record, "weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541, 548, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

{¶54} Appellant was convicted of three counts of attempted receiving stolen property, felonies of the fifth degree, one count of attempted unlawful possession of a dangerous ordinance, a misdemeanor of the first degree, one count of possession of criminal tools, a felony of the fifth degree, one count of dereliction of duty, a misdemeanor of the second degree, and one count of failure to report a crime, a misdemeanor of the fourth degree. In his brief, however, he only challenges his convictions for the attempted receiving stolen property, in violation of R.C. 2913.51(A).

{¶55} In order to convict Appellant of attempted receiving stolen property as it relates to the firearms, the State would have had to prove that Appellant engaged in conduct that, if it was successful, would have resulted in receiving, retaining, or disposing of firearms belonging to another, knowing or having reasonable cause to believe that the firearms were obtained through the commission of a theft offense.

{¶56} Criminal attempt is defined as conduct that when one purposely does or omits to do anything which constitutes a substantial step in a course of conduct planned

to culminate in the commission of the offense. *State v. Woods* (1976), 48 Ohio St.2d 127, 132, 357 N.E. 2d 1059. A substantial step involves conduct which is "strongly corroborative of the actor's criminal purpose." *State v. Green* (1997), 122 Ohio App.3d 566, 569-570, 702 N.E.2d 562.

{¶57} Appellant challenges the State's ability to prove his intent in committing the acts with which he was charged. He argues that he contacted the Metrich drug task force, where his friend Keith Porch worked, in order to gain assistance in apprehending the criminals with the guns. This version of events is simply not supported by the record. To the contrary, the State presented more than sufficient evidence of Appellant's intent and motive, as well as his attempt to purchase or take possession of the firearms.

{¶58} Tommy Thompson testified that he was a police informant and that he was also an acquaintance of Appellant's from childhood. Thompson testified that when he was acting as a police informant, he called Appellant and offered to sell him stolen guns. Appellant admitted to Detective Eric Bosko that he received this phone call and that he scheduled a meeting with Thompson.

{¶59} Thompson testified that he and a fellow informant, James Soles, met with representatives of the Mansfield Police Department as well as agents from ATF in order to prepare to go to Appellant's house to present him with the "stolen" guns. The guns were in fact requisitioned from the Mansfield Police Department's property room.

{¶60} Thompson and Soles drove out to Appellant's house. They were observed by members of the police department, who followed them at a distance and recorded the encounter. The officers all observed Appellant walk out and greet the two

men. Soles stated to Appellant that he had stolen the guns from a contractor in Cleveland, Ohio, who had cheated him out of money. Appellant proceeded to put on a pair of gloves and examine the firearms.

{¶61} Subsequently, Appellant asked to "talk some figures" about the guns and Soles began to give him prices for each gun. Appellant interrupted Soles and asked him for a price on all of the guns. Soles responded that he would sell the group of firearms for $700.00. Appellant informed Thompson and Soles that he needed to make some phone calls. Phone records indicated that Appellant made two phone calls. Appellant informed the men, after neither call was answered, that he could not get into contact with his friends and asked Thompson to get in touch with him later that evening.

{¶62} Appellant allowed the men to leave his residence with four operable firearms, one an SKS assault rifle and another a fully automatic machine gun. After the men left, Appellant did not call the police department for whom he worked, nor did he call the Richland County Sheriff's Office, who had jurisdiction over the Possum Run Road area where Appellant's home is located.

{¶63} Appellant also provided vague and incomplete information to his friend, Officer Keith Porch, regarding the vehicle the men were driving away in. Appellant asserted that he failed to take action because he was afraid for his family. However, Appellant spent time outside of his house with both men and even informed the men that he had a new baby. He also spoke with Thompson about the possibility of Thompson putting a new roof on Appellant's house.

{¶64} Testimony was also presented by the State that showed that Appellant was not making affirmative steps to help in the apprehension of Thompson and Soles

immediately after they left his residence. He claimed that he called Keith Porch to inform him of the attempted sale. He did not call Porch, however, until approximately thirty minutes after they left his residence. Appellant also called Porch approximately twenty minutes later, again asking for assistance in apprehending the men; however, he was not able to convey the license plate of their vehicle.

{¶65} Appellant called Porch a third time, at 5:46 p.m., stating that Thompson had called him again and offered to sell him the handgun for $500.00 and that he had attempted to find out Thompson's location, but that Thompson would not give him his location. The State introduced a recorded phone call from that time wherein Thompson informed Appellant that he was at home. Appellant was also recorded discussing with Thompson his concern that Soles not find out that Appellant was a police officer.

{¶66} Porch, who was called as a witness for the defense, stated that Appellant did not call him at any time in December, 2007, when Thompson offered to sell Appellant stolen crossbows, or in early January, 2008, when Thompson initially called to set up the meeting to view the stolen firearms. All of these omissions on the part of Appellant contradict his stated fear for his family's safety.

{¶67} Based on this evidence, we find that the State presented sufficient evidence to convict Appellant of attempted receiving stolen property.

{¶68} Appellant's second assignment of error is overruled.

III.

{¶69} In his third assignment of error, Appellant argues that the trial court erred by limiting his cross examination of Detective Eric Bosko. We disagree.

{¶70} The admission or exclusion of evidence is left to the discretion of the trial court. *State v. Slagle* (1992), 65 Ohio St.3d 597, 601, 605 N.E.2d 916. Moreover, the extent of cross examination allowed is also within the discretion of the trial court. Ohio Evidence Rule 403 requires a trial court to weigh the danger of unfair prejudice against its probative value. Thus, the standard of review for the admission of evidence is an abuse of discretion. *State v. Sage* (1987), 31 Ohio St.3d 173, 510 N.E.2d 343; *State v. Bey* (1999), 85 Ohio St.3d 487, 490, 709 N.E.2d 484. In order to find an abuse of discretion, we must find more than an error of law or judgment. An abuse of discretion demonstrates that the court's attitude was unreasonable, arbitrary, or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

{¶71} At the trial below, trial counsel sought to cross examine Detective Bosko regarding hearsay statements made by a person named Bobbi Stamper that may have been relied upon to establish probable cause for the search warrant executed at Appellant's house.[1]

{¶72} When trial counsel attempted to elicit information from Bosko at trial regarding statements that Stamper made to him, the prosecution objected. The trial court properly sustained the objection, finding that statements made by Stamper would be inadmissible as hearsay. Trial counsel did not attempt to argue that the statements came in under a hearsay exception; rather, counsel withdrew the question and continued on to other topics.

[1] Appellee argues that the questions that trial counsel sought to ask were well beyond the scope of the prosecution's direct examination. However, this argument lacks merit, as the Ohio rules of evidence do not limit cross examination to the scope of questions asked on direct examination. To the contrary, Ohio law permits cross examination on all relevant matters, regardless of whether the issues were raised first on direct examination. Evid. R. 611(B).

{¶73} The trial court additionally stated, during a bench conference, that any questions at trial regarding the basis for obtaining the search warrant were irrelevant. We agree. If Appellant had issue with the information used to obtain the search warrant, the proper mechanism to challenge the search warrant would have been to file a motion to suppress. The trial court did not err in refusing to allow Appellant to challenge the search warrant at trial.

{¶74} Accordingly, we find that the trial court acted properly in limiting the cross examination of Detective Bosko.

{¶75} Appellant's third assignment of error is overruled.

IV.

{¶76} In his fourth assignment of error, Appellant argues that he was deprived of a fair trial based on instances of prosecutorial misconduct.

{¶77} The test for prosecutorial misconduct is whether the prosecutor's comments and remarks were improper and if so, whether those comments and remarks prejudicially affected the substantial rights of the accused and deprived him of a fair trial. *State v. Lott* (1990), 51 Ohio St.3d 160, 555 N.E.2d 293, certiorari denied (1990), 498 U.S. 1017, 111 S.Ct. 591, 112 L.Ed.2d 596; *State v. Maurer* (1984), 15 Ohio St.3d 239, 266, 473 N.E.2d 768. In reviewing allegations of prosecutorial misconduct, we must review the complained of conduct in the context of the entire trial. *Darden v. Wainwright* (1986), 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144.

{¶78} Initially, we would note that Appellant has provided no case law to support his claims of prosecutorial misconduct as required by App.R. 16(A)(7). Rather,

Appellant simply complains that multiple tactical decisions of the prosecution deprived him of a fair trial.

{¶79} We do not find Appellant's arguments to be persuasive.

{¶80} Appellant first argues that the prosecutor improperly referenced Appellant's testimony from his first trial when cross-examining Officer Porch during the second trial. Though Appellant fails to cite any legal authority to show how the use of a defendant's prior statement would be improper, we assume that Appellant is arguing that the use of his prior sworn testimony from his first trial violated his Fifth Amendment privilege against self-incrimination.

{¶81} It is well settled, however, that a defendant waives his Fifth Amendment privilege against self-incrimination by taking the stand on his own behalf at trial. By doing so, Appellant waived his right to assert the privilege of the Fifth Amendment when such testimony was used against him in a subsequent trial on the same offenses. *State v. Wolf*, 11th Dist. No. 94-L-047, citing *Harrison v. United States* (1968), 392 U.S. 219, 222, 88 S.Ct. 2008, 20 L.Ed.2d 1047; *State v. Slone* (1975), 45 Ohio App.2d 24, 27-28, 340 N.E.2d 413.

{¶82} The court in *Slone*, supra, listed the following rationales for permitting the introduction of testimony of an accused at a subsequent trial: "(1) by taking the stand at trial, the defendant becomes as any other witness and his testimony can be used in anyway which any witnesses' testimony might be used (see *Bess v. Commonwealth*, 118 Ky. 858, 82 S.W. 576 (1904)); (2) that the defendant's testimony at his first trial or judicial hearing is an admission or declaration against interest, and is therefore no different from any voluntary out of court statement and therefore may be introduced at a

subsequent trial of the accused (see *State v. Farrell*, 223 N.C. 804, 28 S.E.2d 560 (1944)); (3) that the admission or use of the defendant's prior testimony may tend to show guilt (see *Miller v. People*, 216 Ill. 309, 74 N.E. 743 (1905)); (4) that the introduction of a defendant's former testimony does not tend to compel him to incriminate himself (see *State v. Tellay*, 100 Utah 25, 110 P.2d 342 (1949)); (5) that the use of the defendant's prior testimony does not constitute a comment on his failure to testify at his current trial (see *Miller v. People*, 216 Ill. 309, 74 N.E. 743 (1905)). The use of one or more of these rationales is not dependant [sic] upon whether such testimony was used during the Government's case-in-chief (see *People v. Boyd*, 67 Cal.App. 292, 227 P. 783 (1924)), on rebuttal or cross (see *Collins v. State*, 39 Tex.Cr. 441, 46 S.W. 933 (1898)), or on whether the defendant's original testimony had been given at a preliminary hearing (see *Dickerson v. State*, 48 Wis. 288, 4 N.W. 321 (1880)).'"

{¶83} As such, we find Appellant's argument that the prosecution inappropriately used his prior testimony to be without merit.

{¶84} Appellant also argues that it was error for the prosecution to mention Joshua Conley and Rebekah Leicy during the State's opening statement. In addition to our disposition of this issue as it relates to Appellant's first assignment of error, we would note again that we do not find that the comment in opening statement was improper. At most, the prosecutor mentioned two witnesses in passing in his opening statement and did not provide any detail regarding the alleged other acts of Appellant with respect to those two witnesses.

{¶85} Moreover, when this statement is viewed in the context of the whole trial, we simply do not find that it caused any prejudice to Appellant. We find Appellee's

argument to be persuasive that if any harm was done by the mention of these witnesses in the prosecution's opening statement, that harm would have been done to the State's case and not to Appellant's case. If the jurors did indeed remember the names being mentioned in opening statement, any negative impact would likely have been to the State for failing to deliver witnesses it promised the jury would hear from during the course of the trial.

{¶86} Finally, Appellant argues that it was prosecutorial misconduct to display the electronic equipment seized from Appellant's home during the execution of the search warrant. Appellant fails to cite to any place in the record that would support his claim. App. R. 16(D). As such, we decline to address his argument and presume regularity in the proceedings below.

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

V.

{¶88} In his fifth, and final, assignment of error, Appellant claims that cumulative errors in his trial deprived him of a fair trial. We disagree.

{¶89} In *State v. Garner* (1995), 74 Ohio St.3d 49, 64, 656 N.E.2d 623, 637, the Supreme Court held that pursuant to the cumulative error doctrine "a conviction will be reversed where the cumulative effect of errors in a trial deprives a defendant of the constitutional right to a fair trial even though each of numerous instances of trial court error does not individually constitute cause for reversal."

{¶90} In the present case, we do not find that there have been multiple instances of harmless error triggering the cumulative error doctrine. Appellant's fifth assignment of error is overruled.

{¶91} For the foregoing reasons, the judgment of the Richland County Court of Common Pleas is affirmed.

By: Delaney, J.

Edwards, P.J. and

Hoffman, J. concur.

HON. PATRICIA A. DELANEY

HON. JULIE A. EDWARDS

HON. WILLIAM B. HOFFMAN

[Cite as *State v. King*, 2010-Ohio-4844.]

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
MAURICE KING, III	:	
	:	
Defendant-Appellant	:	Case No. 08-CA-335
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Richland County Court of Common Pleas is affirmed. Costs assessed to Appellant.

_____
HON. PATRICIA A. DELANEY

_____
HON. JULIE A. EDWARDS

_____
HON. WILLIAM B. HOFFMAN