[Cite as *State v. Hall*, 2009-Ohio-4807.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	
PLAINTIFF-APPELLEE,	)	
	)	
V.	)	CASE NO. 08-MA-97
	)	
JAMES A. HALL,	)	OPINION
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Court of Common Pleas of Mahoning County, Ohio Case No. 07CR1528
JUDGMENT:	Affirmed
APPEARANCES: For Plaintiff-Appellee	Paul Gains Prosecutor Ralph M. Rivera Jennifer McLaughlin Asst. Mahoning County Prosecutors 21 West Boardman Street Youngstown, Ohio 44503
For Defendant-Appellant	Attorney David J. Betras 6630 Seville Drive Canfield, Ohio 44406

JUDGES:

Hon. Gene Donofrio
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: September 9, 2009

[Cite as *State v. Hall*, 2009-Ohio-4807.]
DONOFRIO, J.

{¶1} Defendant-appellant, James A. Hall, appeals his conviction in the Mahoning County Common Pleas Court for aggravated murder with firearm and violent offender specifications and having weapons while under disability. Hall advances four assignments of error: (1) sufficiency of the evidence; (2) weight of the evidence; (3) prejudicial error by the trial court in allowing the state to introduce the testimony of a witness not properly disclosed in discovery before trial; and (4) error in allowing the jury to view a transcript without a proper cautionary instruction.

{¶2} This is a case about a drug dealer who murdered a drug addict who purchased drugs from him for law enforcement as a confidential informant. In the fall and winter of 2005, Jeffrey Queen made three controlled buys of crack cocaine from Hall for law enforcement which resulted in Hall's indictment for drug trafficking.

{¶3} In the fall of 2006 and after being released on bond, Hall met with Jason Decenso. During that conversation, Hall told Decenso that he learned the identity of the informant who had made the controlled buys that led to his arrest. Hall expressed a desire to kill the informant and discussed with Decenso finding an abandoned house in Cleveland to lure the informant to and kill him.

{¶4} On October 13, 2006, Hall went to work at BRT Extrusions in Niles, Ohio for his 4:30 p.m. to 12:30 a.m. shift. Near the end of his shift, the machines malfunctioned and Hall was allowed to leave work early. At 12:12 a.m. (now on October 14, 2006), Hall called Queen from an area near BRT Extrusions.

{¶5} Around 12:30 a.m., residents in the area of Riblett Road in Youngstown, Ohio heard gunshots and described seeing a car similar to Hall's. At 12:37 a.m. and 12:47 a.m., Hall made calls from his cellular phone in the area of Riblett Road. At 1:51 a.m., Hall was stopped by police in Liberty Township, Ohio and issued a traffic citation.

{¶6} Queen's body was discovered later that morning lying in the woods nearby Riblett Road. Later, Hall's light blue Cadillac was seized. A gunshot residue component was recovered from the driver's side door handle of the vehicle. Vegetation, later identified as Japanese Honeysuckle, was recovered from the

driver's side floorboard. That same vegetation surrounded the area where Queen's body was recovered.

{¶7} On December 6, 2007, a Mahoning County grand jury indicted Hall on two counts in connection with Queen's death: (1) aggravated murder in violation of R.C. 2903.01(A)(F), a felony life offense; and (2) having weapons while under disability in violation of R.C. 2923.13(A)(2)(B), a third-degree felony. The aggravated murder count carried with it firearm and repeat violent offender specifications. R.C. 2941.145(A); R.C. 2941.149. Hall pleaded not guilty and was appointed counsel. The case proceeded to discovery and other pretrial matters.

{¶8} On May 5, 2008, a jury trial commenced and on May 8 the jury convicted Hall on all counts including the specifications. On May 9, 2008, the trial court sentenced Hall to life imprisonment without parole on the aggravated murder count. The court also sentenced Hall to consecutive terms of three years for the firearm specification and five years for the having weapons while under disability conviction. This appeal followed.

SUFFICIENCY/WEIGHT OF THE EVIDENCE

{¶9} Hall raises four assignments of error. Hall's first and second assignments will be addressed together. They state, respectively:

{¶10} "THE VERDICT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶11} "THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE CONVICTION."

{¶12} Though sufficiency and manifest weight involve two different standards of review, they will be discussed together because both call for a detailed review of the evidence and because Hall advances virtually the same arguments in support of each.

{¶13} Sufficiency of the evidence is the legal standard applied to determine whether the case may go to the jury or whether the evidence is legally sufficient as a matter of law to support the jury verdict. *State v. Smith* (1997), 80 Ohio St.3d 89, 113,

684 N.E.2d 668. In essence, sufficiency is a test of adequacy. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541. Whether the evidence is legally sufficient to sustain a verdict is a question of law. Id. In reviewing the record for sufficiency, 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. *Smith*, 80 Ohio St.3d at 113, 684 N.E.2d 668.

{¶14} Alternatively, in determining whether a verdict is against the manifest weight of the evidence, a court of appeals must review the entire record, weigh the evidence and all reasonable inferences and determine 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 and a new trial ordered. See *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541. "Weight of the evidence concerns 'the inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other.'" (Emphasis sic.) Id. In making its determination, a reviewing court is not required to view the evidence in a light most favorable to the prosecution, but may consider and weigh all of the evidence produced at trial. Id. at 390 (Cook, J., concurring). "A reversal based on the weight of the evidence, moreover, can occur only after the State both has presented *sufficient evidence* to support conviction and has persuaded the jury to convict." (Emphasis sic.) Id. at 388.

{¶15} Reversal based on a successful weight-of-evidence challenge is reserved only for the exceptional case in which the evidence weighed so heavily against conviction that the jury clearly must have lost its way, creating a manifest miscarriage of justice. Id. Indeed, reversing on weight of the evidence after a jury trial is so extreme that it requires the unanimous vote of all three appellate judges rather than a mere majority vote. *Thompkins,* 78 Ohio St.3d at 389, 678 N.E.2d 541, citing Section 3(B)(3), Article IV of the Ohio Constitution (noting that the power of the court

of appeals is limited in order to preserve the jury's role with respect to issues surrounding the credibility of witnesses).

{¶16} Hall argues that the state failed to prove its case against him because it could not place him at the scene when and where Queen was shot and killed, and there was no physical evidence connecting him to the crime. Hall maintains that his shift at BRT Extrusion in Niles, Ohio ended at 12:20 a.m. He went to the locker room, washed his hands, and went to the parking lot where his car was located. From there, he claims he went to the Tallyho Hotel on Belmont Avenue in Youngstown, Ohio to meet with Tamika Davis, the mother of his child. Davis brought the child into town so that Hall could visit with her. Hall states that he got to the hotel by 12:45 a.m. Because no one heard the gunshots until 12:30 a.m. or 12:35 a.m., Hall implicitly asserts that it would have been physically impossible for him to travel from work to the murder scene and then to the hotel by 12:45 a.m.

{¶17} Hall claims he did not learn of Queen's death or that Queen was the confidential informant that led to his drug trafficking indictment until the day after Queen was shot, on October 15, 2006. Hall notes that he cooperated with police by consenting to the search and seizure of his vehicle and by permitting a gun shot residue of his hands and a mouth swab. He points out that no gun shot residue was found on his hands, no gun was recovered from his vehicle, and there was no evidence that a gun had been fired in the vehicle. Likewise, he notes the lack of blood evidence and any witnesses placing him at the scene of the crime.

{¶18} Aggravated murder is committed when a person purposely, and with prior calculation and design, causes the death of another. R.C. 2903.01(A). There are several factors that, when taken together, prove Hall purposely, and with prior calculation and design, shot and killed Queen: (1) Queen and Hall had an existing drug related relationship that led to Hall's indictment for drug trafficking; (2) Hall expressed a desire to kill the confidential informant who made the controlled purchases that led to his arrest for drug trafficking; (3) residents in the area where Queen was shot and killed described seeing a vehicle similar to Hall's in that area at

that time; (4) Hall had nearly daily communications with Queen including right up to his death, but made no attempt to contact him thereafter; (5) physical evidence tying Hall to the murder scene; and (6) Hall's after-the-fact tacit admission that he killed the informant that got him indicted.

{¶19} Queen made three controlled purchases of crack cocaine for law enforcement from Hall in October, November, and December 2005. (Tr. 308-314, State's Exhibits 1, 2, & 3.) Those purchases resulted in Hall's indictment on two counts of drug trafficking in the Mahoning County Common Pleas Court the following spring of 2006. (Tr. 644-645, Defense Exhibit 5.) Queen's identity was never revealed in that case. However, the indictment itself provided the exact dates of the buys and the vehicle Hall used when making them. (Defense Exhibit 5.) Through discovery, additional information was provided concerning the sales relative to the kind of drugs, quantity of drugs, and location of the sales. (Tr. 642.) The indictment alone, aside from discovery, provided sufficient information for a drug dealer of Hall's caliber to deduce the identity of the informant. After initially being arrested on those charges, Hall's attorney was able to obtain his release to electronically monitored house arrest (EMHA) so that he could continue to work at his job at BRT Extrusions in Niles, Ohio. (Tr. 627.)

{¶20} Jason Decenso testified about Hall's desire to kill the confidential informant who had made the controlled purchases from him that led to his arrest. (Tr. 560-579.) Decenso and Hall became friends in 2000 while they were both incarcerated in prison. (Tr. 560.) Hall was serving a prison sentence after pleading guilty to voluntary manslaughter and felonious assault. (Tr. 609-610, State's Exhibit 49.) Following their respective releases from prison, Decenso and Hall continued their relationship which consisted of "[m]ostly selling drugs and stuff." (Tr. 562.) On occasion, Decenso sold drugs to Hall. (Tr. 562.) Decenso always knew Hall to carry a handgun. (Tr. 563.) He described a conversation he had with Hall in the fall of 2006:

{¶21} "Q Did there come a point in the fall of 2006 where you had a conversation with Mr. Hall about the fact that he had a confidential informant in a case?

{¶22} "A Yes, sir.

{¶23} "Q Now, what was that first conversation?

{¶24} "* * *

{¶25} "A That I knew that he had a drug case, and then he told me he knew -- he had found out from going to court who cooperated against.

{¶26} "Q He found out who the informant was?

{¶27} "A Yes.

{¶28} "Q And what did he want?

{¶29} "A He wanted to kill him.

{¶30} "* * *

{¶31} "Q And did he ask you to cooperate in that?

{¶32} "A Yes.

{¶33} "Q What did he ask?

{¶34} "A He asked me to find an abandoned house?

{¶35} "Q He said an abandoned house?

{¶36} "A (Witness nodding head.)

{¶37} "Q Where?

{¶38} "A In Cleveland.

{¶39} "Q And what was the need to find the house?

{¶40} "A He was going to take him there.

{¶41} "Q And?

{¶42} "A Kill him." (Tr. 563-564.)

{¶43} In the early morning hours of Saturday, October 14, 2006, residents on Riblett Road in Austintown, Ohio heard a succession of gunshots. (Tr. 414-428, 428-437, 437-442, 444-453.) Norman Lavelle heard the gunshots and described seeing an older Cadillac drive by. (Tr. 422.) Josh Ervin also heard the gunshots and

described a light blue car. (Tr. 431.) Jeremy Cavender, who was visiting his girlfriend on Riblett Road heard the shots and observed a light colored car with square headlights drive by. (Tr. 452.) Collectively, each of their descriptions of the vehicle they saw that night is similar to Hall's 1986, four door, light blue, Cadillac that he was stopped in on the following day. (Tr. 471, Tr. 599, State's Exhibits 4-7, 19.)

{¶44} Queen's cell phone was found under his body. The last incoming call he received was from Hall at 12:12 a.m. on October 14, 2006. Hall testified in his own defense that he went from work to the TallyHo hotel to see Tamika Davis and his child. However, at 12:37 a.m. and 12:47 a.m., Hall made calls from his cellular phone in the area of Riblett Road, the murder scene. Nor was Tamika Davis called to testify and substantiate Hall's account. Also, Hall had regular communication with Queen right up to the time of Queen's death. In the two weeks leading up to Queen's murder, there were a total of 85 communications (voice calls, voice mails, and text messages) between Hall and Queen, as documented by Queen's cell phone records. (State's Exhibit 12.) After Queen's murder, Hall made no further attempts to contact Queen.

{¶45} In addition to cell phone calls Hall made in the area of the murder scene, some physical evidence also tied him to the scene. Queen's body was discovered outside, about 30 feet from Riblett Road next to a wooded area. (Tr. 456.) The ground was covered with vine, called Japanese Honeysuckle. (Tr. 466, 512-516.) When Hall gave his consent to search his vehicle the following day, police recovered that same type of vine from the driver's side floorboard. (Tr. 473.) Additionally, lead, a component of gunshot residue, was recovered from the driver's side door handle. (Tr. 478, 548-550.)

{¶46} Lastly, Hall provided a tacit admission that he killed Queen. Jason Decenso met up with Hall again on June 8, 2007. By that time, Decenso had become a cooperating source for the Cleveland office of the Drug Enforcement Administration. At the behest of law enforcement, Decenso arranged the meeting with Hall which was to be audio and visually recorded. Decenso was instructed to tell

Hall that he had been arrested for drug trafficking and was interested in having the informant killed for $5,000. At the meeting, Hall accepted the offer. (Tr. 562.) Following that, Decenso asked Hall how he was out of jail. Hall replied, "put two and two together." (State's Exhibit 14.)

{¶47} To be sure, the state's case was primarily a circumstantial one. "It is, however, well-settled under Ohio law that a defendant may be convicted solely on the basis of circumstantial evidence. [P]roof of guilt may be made by circumstantial evidence as well as by real evidence and direct or testimonial evidence, or any combination of these three classes of evidence. All three classes have equal probative value, and circumstantial evidence has no less value than the others. Circumstantial evidence is not less probative than direct evidence, and, in some instances, is even more reliable." (Internal citations and quotations omitted.) *State v. Nicely* (1988), 39 Ohio St.3d 147, 151, 529 N.E.2d 1236.

{¶48} Upon review of all the evidence, and according due deference to the jury's credibility determinations and resolution of factual inconsistencies in the testimony, a rational jury could have reasonably concluded that Hall is guilty beyond a reasonable doubt of aggravated murder. Thus, Hall's conviction was based upon sufficient evidence and was not against the manifest weight of the evidence.

{¶49} Accordingly, Hall's first and second assignments of error are without merit.

DISCOVERY – WITNESS DISCLOSURE

{¶50} Hall's third assignment of error states:

{¶51} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN ALLOWING THE STATE TO INTRODUCE THE TESTIMONY OF A WITNESS NOT PROPERLY DISCLOSED IN DISCOVERY BEFORE TRIAL."

{¶52} The incriminating conversation between Hall and Jason Decenso that was recorded by law enforcement took place on June 8, 2007. Decenso's name was not disclosed to Hall's counsel until May 2, 2008, when the state provided counsel with an updated witness list. (Tr. 11.) Trial commenced on May 5, 2008. Before voir

dire, Hall's counsel orally moved to exclude Decenso as a witness. (Tr. 11.) When Decenso took the stand on the second day of trial, Decenso readily admitted on direct examination by the state that he was testifying against Hall in exchange for consideration at his sentencing in federal court for drug trafficking. (Tr. 565.)

{¶53} Hall argues that the state failed to comply with the discovery rules concerning Decenso as a witness under Crim.R. 16. More specifically, Hall alleges: (1) Decenso's identity was not disclosed until three days prior to trial; (2) Decenso's criminal history was not provided to his counsel until the day of trial; and (3) the state did not disclose the deal Decenso received in exchange for testifying against him until the second day of trial. Hall argues that the trial court erred in allowing Decenso to testify and permitting the recorded meeting between Decenso and himself to be played before the jury.

{¶54} In response, the state argues that the trial court did not abuse its discretion in allowing Decenso to testify or the recorded conversation to be played for the jury. The state argues that there was no willfulness on its part in disclosing Decenso as a witness when it did. It also claims that Hall had foreknowledge of Decenso via disclosure of the recorded June 8, 2007 conversation and that Hall was not prejudiced by its admission.

{¶55} A trial court's decision on whether to exclude a witness for reason of lack of timely discovery will only be disturbed on appeal in cases of clear abuse of discretion. Crim.R. 16(E)(3); *State v. Finnerty* (1989), 45 Ohio St.3d 104, 543 N.E.2d 1233. Abuse of discretion connotes more than an error of law or judgment; it implies that the trial court's decision was arbitrary, unreasonable or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

{¶56} "'The purpose of discovery rules is to prevent surprise and the secreting of evidence favorable to one party.'" *State v. Smith* (Aug. 10, 2001), 11th Dist. No.2000-A-52, quoting *Lakewood v. Papadelis* (1987), 32 Ohio St.3d 1, 3, 511 N.E.2d 1138. "The overall purpose of the discovery rules is to produce a fair trial." Id., citing *State v. Mitchell* (1975), 47 Ohio App.2d 61, 80, 352 N.E.2d 636.

{¶57} Crim.R. 16 provides:

{¶58} "(B) Disclosure of evidence by the prosecuting attorney

{¶59} "(1) Information subject to disclosure.

{¶60} "* * *

{¶61} "(c) Documents and tangible objects. Upon motion of the defendant the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, available to or within the possession, custody or control of the state, and which are material to the preparation of his defense, or are intended for use by the prosecuting attorney as evidence at the trial, or were obtained from or belong to the defendant.

{¶62} "* * *

{¶63} "(e) Witness names and addresses; record. Upon motion of the defendant, the court shall order the prosecuting attorney to furnish to the defendant a written list of the names and addresses of all witnesses whom the prosecuting attorney intends to call at trial, together with any record of prior felony convictions of any such witness, which record is within the knowledge of the prosecuting attorney. * * *

{¶64} " * * *

{¶65} "(E) Regulation of discovery

{¶66} " * * *

{¶67} "(3) Failure to comply. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances."

{¶68} "Crim.R. 16(E)(3) provides for the regulation of discovery in a criminal case and permits a trial court to exercise discretion in determining the appropriate

sanction for a discovery violation." *State v. Scudder* (1994), 71 Ohio St.3d 263, 268, 643 N.E.2d 524. When a prosecutor violates Crim.R. 16 by failing to provide the name of a witness, a trial court does not abuse its discretion in allowing the witness to testify where the record fails to disclose (1) a willful violation of the rule, (2) that foreknowledge would have benefited the accused in the preparation of his or her defense, or (3) that the accused was unfairly prejudiced. *Scudder,* 71 Ohio St.3d at 269, 643 N.E.2d 524; *State v. Heinish* (1990), 50 Ohio St.3d 231, 553 N.E.2d 1026, syllabus. "The same tripartite test applies for determining whether a trial court has abused its discretion in admitting other evidence that was not properly disclosed under Crim.R. 16." *Scudder,* supra.

{¶69} In this case, the trial court did not abuse its discretion in allowing Decenso to testify. First, there is no evidence in the record to suggest that the prosecutor willfully violated the discovery rules. (Tr. 11-17.) Although late, the prosecutor did disclose to Hall's counsel three days prior to trial its intent to call Decenso to testify. This court has previously found no error with a three day window between disclosure and trial. *State v. Pottersnak* (June 29, 2001), 7th Dist. No. 00-JE-19. Also, Decenso testified, during cross-examination, that he never met the prosecutor assigned to Hall's case until the day he testified at trial. (Tr. 577.) Moreover, the state had previously provided the recorded meeting to Hall's counsel. His counsel never took issue with the timing of that disclosure and Decenso's face is plainly visible in the video.

{¶70} Second, Hall has not indicated how further foreknowledge of Decenso as a witness would have benefited him in the preparation of his defense. Hall had already been provided recorded conversation in earlier discovery. Since Hall and Decenso are clearly in the recording, Hall's own recollection of the meeting was sufficient to put him on notice that Decenso was likely to be used as a witness against him.

{¶71} Third, Hall has failed to demonstrate how he was unfairly prejudiced. This court has previously held "that a trial court does not abuse its discretion in

permitting the testimony of a witness not included on a witness list if the defendant fails to request a continuance, or an opportunity to voir dire the witness, or even a recess before his cross and re-cross of the witness." (Internal quotations omitted.) *State v. Brown* (Sept. 30, 1991), 7th Dist. No. 89 C.A. 120, citing *State v. Abi-Sarkis* (1988), 41 Ohio App.3d 333, 340, 535 N.E.2d 745. Although Hall's counsel objected to the admission of the evidence, he did not seek a continuance or a recess, nor did he request an opportunity to voir dire the witness.

{¶72} Accordingly, Hall's third assignment of error is without merit.

RECORDED CONVERSATION TRANSCRIPT

{¶73} Hall's fourth assignment of error states:

{¶74} "THE TRIAL COURT ERRED IN ALLOWING THE JURY TO VIEW A TRANSCRIPT WITHOUT A PROPER CAUTIONARY INSTRUCTION."

{¶75} Detective Jeffrey Solic was investigating Queen's murder when he learned in April 2007 from the DEA Cleveland Office that they had a cooperating source who had information linking Hall to the murder. (Tr. 357.) As previously indicated, coordinating with the Cleveland DEA office, Det. Solic set up a meeting between Decenso and Hall which was audio and visually recorded by a hidden camera (unbeknownst to Hall). (Tr. 358.) Using a live feed, Det. Solic listened to their conversation as it took place. (Tr. 358.) Det. Solic then made a typewritten transcript of the recorded conversation with the certain areas marked UI for sections of the recording that were unintelligible or inaudible. (Tr. 360.) At trial, Hall's counsel objected to the use of the transcript by the jury to assist in listening to the recorded conversation. (Tr. 344.) Hall's counsel took issue with Det. Solic being able to present his "interpretation" of the conversation to the jury and argued that the transcript and recording contained references to irrelevant matters that would prejudice Hall. (Tr. 344-345, 349.) The trial court permitted the jury to review the transcript while the recording was played. (Tr. 361, 363.) Before the jury was handed copies of the transcript, it told the jury that "the transcript is Detective Solic's interpretation of what occurred in that conversation as he's described to the best of his ability." (Tr. 362-

363.) The recording and the transcript include Hall's tacit admission to Queen's murder. After the recording was played, Det. Solic explained what certain slang terms that were used in the conversation meant in the illicit drug trade. When at the close of the state's case it tried to have the transcript admitted as evidence, the trial court sustained Hall's counsel's objection and the transcript did not go to the jury for deliberations. (Tr. 601.)

{¶76} Hall claims that the trial court erred in allowing the jury to view the transcript of the recorded conversation. He contends that the best evidence was the recording itself. Citing *State v. Holmes* (1987) 36 Ohio App.3d 44, 521 N.E.2d 479; *United State v. McMillan* (C.A.8, 1974), 508 F.2d 101, 105-106. He argues that his counsel was not given the opportunity to verify the transcript accuracy and that the trial court did not give a cautionary instruction regarding the transcript. As for the cautionary instruction, Hall believes the jury should have been advised to rely on what they heard on the recording rather than what they read in the transcript and that "differences in meaning may be caused by such factors as the inflection in a speaker's voice or inaccuracies in the transcript." (Hall's Brief, p. 20.) Citing *State v. Rogan* (1994), 94 Ohio App.3d 140, 161, 640 N.E.2d 535.

{¶77} The state sees no error in the trial court's allowing the jury to view the transcript. It cites case law for the proposition that a transcript can be used to assist the jury in listening to a recorded conversation. Citing *State v. Graves* (Oct. 6, 1994), 8th Dist. No. 66238.

{¶78} The best evidence rule provides that in order to prove the contents of a recording, the original is required except as otherwise provided by rule or statute. Evid.R. 1002. Although a duplicate of the original is usually admissible, a transcript of a recording is not a duplicate. Evid.R. 1001; Evid.R. 1003.

{¶79} *State v. Holmes* (1987) 36 Ohio App.3d 44, 521 N.E.2d 479, cited by Hall, is similar to this case. Police recorded a conversation between the defendant and a cooperating witness. A person who was not an objective third party prepared a transcript of the recording. The recording, portions of which were inaudible, was

played for the jury and the jury was allowed to review the transcript as an aid in listening to the recording. Only the recording itself, and not the transcripts, were sent to the jury room for deliberations. The touchstone of the Tenth District's analysis became whether there were "material differences" between the recording and the transcript. The court found no prejudicial error in light of the fact that the defendant was unable to point out any material differences between the tapes and the transcript supplied to the jury as listening aids. The court then held, "The use of a typed transcript as a visual aid to the jury in listening to the playback of the recorded communication is a matter within the sound discretion of the trial court." Id. at 50.

{¶80} Five years later, the Ohio Supreme Court stated that the best evidence rule is irrelevant where the transcript is submitted but not admitted into evidence. *State v. Waddy* (1992), 63 Ohio St.3d 424, 445-446, 588 N.E.2d 819. Like in *Waddy*, the transcript in this case was only used as an aid for jurors as they listened to the actual recording. It was not admitted into evidence. Citing the Tenth District's decision in *Holmes*, the *Waddy* court also noted, "Where there are no "material differences" between a tape admitted into evidence and a transcript given to the jury as a listening aid, there is no prejudicial error." Id. at 445, 588 N.E.2d 819.

{¶81} As the Eighth District observed in *State v. Graves* (Oct. 6, 1994), 8th Dist. No. 66238:

{¶82} "Allowing jurors to have a transcript of a taped conversation is no different than allowing a juror to refer to a photograph or map. Jurors often view crime scenes, yet take photographs of the crime scene into their deliberations. In automobile accident cases, jurors often use drawings of the accident scene to assist them in determining liability. One could argue that a transcript might be more accurate than a photograph since lighting and camera angle might distort the image on the photograph."

{¶83} As in *Holmes* and *Waddy*, Hall here does not point to any specific examples of "material differences" between the recording and the transcript. Thus, it was within the trial court's discretion to allow the jury to use the transcript as a

listening aid. There being no error in that, there was no need for a cautionary instruction.

{¶84} Nonetheless, additional procedural safeguards existed in this case that prevented any chance of prejudicial error to Hall. Although not required to do so, the trial court did caution the jury that "the transcript is Detective Solic's interpretation of what occurred in that conversation as he's described to the best of his ability." (Tr. 362-363.) Moreover, the only two parties to the recorded conversation (Hall and Decenso) and the person who transcribed the recording (Det. Solic) all testified and were subject to cross-examination.

{¶85} Accordingly, Hall's fourth assignment of error is without merit.

{¶86} The judgment of the trial court is hereby affirmed.

Waite, J., concurs.

DeGenaro, J., concurs.