[Cite as *State v. Tucker*, 2012-Ohio-139.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2010-10-263
	:	O P I N I O N
- vs -		1/17/2012
	:	
DONALD WAYNE TUCKER,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2009-11-1716

Michael T. Gmoser, Butler County Prosecuting Attorney, Donald R. Caster, Government Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45011, for plaintiff-appellee

Brian R. Hester, P.O. Box 1324, Hamilton, Ohio 45012, for defendant-appellant

RINGLAND, J.

{¶1} Defendant-appellant, Donald Wayne Tucker, appeals from his conviction in the Butler County Court of Common Pleas for the murder of Brian McKenzie. For the reasons outlined below, we affirm.

{¶2} On the morning of October 29, 2009, McKenzie, who had known appellant since 1998, rode his bicycle to appellant's nearby Middletown home. Upon McKenzie's arrival, appellant, who was busy stripping down old air conditioning units in the backyard in

order to sell the parts at the local scrap yard, asked McKenzie if he would like to come inside and have a beer. Thereafter, once appellant finished stripping down the old air conditioning units, the two men gathered up the spare parts and rode their bicycles to the scrap yard. After leaving the scrap yard, the two men then rode their bicycles to the gas station and a local thrift store where they purchased ten 40-ounce beers, a pack of cigarettes, rolling papers, and tobacco. Once they made their purchases, the two men then returned to appellant's home to drink their beer and watch television.

{¶3} According to appellant's testimony, the events leading up to McKenzie's death are as follows:

{¶4} After a long day of drinking beer and watching television, McKenzie, who had "got pretty lushed" to the point where he exhibited slurred speech and had difficulty maintaining his balance, suddenly jumped up from the couch and grabbed a knife that was stuck in a dart board hanging above the television set. McKenzie then turned towards appellant, threw his hands in the air, "said this Indian thing," and exclaimed that he wanted to die. Appellant, who was also "pretty drunk then," told McKenzie to "go ahead." Apparently frustrated with appellant's response, McKenzie gave appellant "a little smirk" before returning to the couch and placing the knife down on the coffee table in front of him.

{¶5} Appellant, not wanting McKenzie to have access to a knife in his intoxicated state, got up from his chair and made his way towards McKenzie. However, before appellant could get to the knife, McKenzie grabbed it off the coffee table and started acting "like he was in a rage or something." Believing that he was in danger, appellant reached out and grabbed a "pressure point" on McKenzie's neck that allowed him to "wrestle" the knife away with one hand. According to appellant, because he was able to use these defensive maneuvers, he sustained only "a little nick" during the struggle.

{¶6} Once he procured the knife, appellant, "trying to back up to somehow get

away," took two steps back when McKenzie started "wailing" and punching him. Still attempting to diffuse the situation, appellant asked McKenzie to "sit down and drink [our] beer, buddy." However, despite appellant's request, McKenzie just "kept pushing and pushing." In response to McKenzie's unwillingness to stop "wailing" on him, appellant acknowledges stabbing McKenzie in the chest one time before blacking out. Although he does not remember, appellant then called 9-1-1 to report the stabbing. When asked by the 9-1-1- operator why he stabbed McKenzie, appellant responded by stating "just drunk."

{¶7} Upon arriving at the scene, Middletown police discovered McKenzie's body lying face down in a pool of blood between the coffee table and the couch with the knife lying across his buttocks. Appellant was then taken into custody while McKenzie was rushed to the hospital where he was pronounced dead. An autopsy report later revealed that McKenzie had been stabbed in the chest four times and had sustained ten additional abraded incised wounds all within a five by five inch area above his heart. According to Dr. Brian Casto, a forensic pathologist with the Montgomery County Coroner's Office, any of the four stab wounds would have been fatal.

{¶8} On December 9, 2009, the Butler County Grand Jury returned an indictment charging appellant with one count of murder in violation of R.C. 2903.02(A), as well as one count of felony murder in violation of R.C. 2903.02(B), both unclassified felonies.

{¶9} On September 30, 2010, after his first trial resulted in a mistrial, the jury returned a verdict finding appellant guilty on both murder charges. Thereafter, upon merging the two offenses, the trial court sentenced appellant to a term of 15 years to life in prison.

{¶10} Appellant now appeals from his conviction, raising four assignments of error for review.

{¶11} Assignment of Error No. 1:

{¶12} "THE TRIAL COURT VIOLATED THE APPELLANT'S CONSTITUTIONAL FAIR

TRIAL RIGHTS WHEN IT, SUA SPONTE, EXCLUDED WILLIAM REYNOLDS' TESTIMONY RIGHT BEFORE HE WAS TO BE CALLED BY THE DEFENSE."

{¶13} In his first assignment of error, appellant argues that the trial court erred by excluding the testimony of William Reynolds. Reynolds, a neighborhood acquaintance of both McKenzie and appellant, would have testified that McKenzie told Reynolds of his intentions to go to appellant's house later that day and kill appellant. In support of this claim, appellant argues that Reynolds' testimony, although hearsay, was nonetheless admissible pursuant to Evid.R. 803(3) to establish McKenzie's "state of mind, his motive, in going to appellant's residence that night." While we agree with appellant that it was error for the trial court to exclude this evidence, we nevertheless find the error to be harmless.

{¶14} The admissibility of relevant evidence rests within the sound discretion of the trial court. *State v. Jones*, Butler App. No. CA2006-11-298, 2008-Ohio-865, ¶10, citing *State v. Sage* (1987), 31 Ohio St.3d 173, paragraph two of the syllabus. Absent an abuse of discretion, as well as a showing that the party suffered material prejudice, an appellate court will not disturb a trial court's ruling as to the admissibility of evidence. *State v. Martin* (1985), 19 Ohio St.3d 122, 129. An abuse of discretion implies that the court's decision was unreasonable, arbitrary, or unconscionable, and not merely an error of law or judgment. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶130. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *State v. Wyatt*, Butler App. No. CA2010-07-171, 2011-Ohio-3247, ¶7.

{¶15} Evid.R. 803(3), which provides an exception to the general hearsay rule, allows for the admission of "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)." As stated by the Ohio Supreme Court, "[u]nder Evid.R. 803(3), statements of current intent to take future actions are admissible for the inference that the

intended act was performed." *State v. Hand*, 107 Ohio St.3d 378, 2006-Ohio-18, ¶99; *State v. Hubbard*, Butler App. No. CA2006-10-248, 2008-Ohio-3379, ¶24.

{¶16} At trial, mere moments before appellant was to call Reynolds to the stand, the trial court held a sidebar conference during which it determined that Reynolds could not testify as to McKenzie's statements indicating his intent to kill appellant. After a thorough review of the record, we find this to be error as Reynolds' proffered testimony reflects McKenzie's then existing state of mind indicating his intent to take a future action admissible pursuant to Evid.R. 803(3). See *State v. Lewis*, Fayette App. No. CA2010-08-017, 2011-Ohio-415, ¶35; *State v. Hogg*, Franklin App. No. 11AP-50, 2011-Ohio-6454, ¶45-46. However, although we find the trial court's decision to exclude this testimony was in error, we nevertheless find the error to be harmless.

{¶17} As this court has stated previously, an accused has "a constitutional guarantee to a trial free from prejudicial error, not necessarily one free of all error." *State v. Swartsell*, Butler App. No. CA2002-06-151, 2003-Ohio-4450, ¶31, quoting *State v. Brown*, 65 Ohio St.3d 483, 485, 1992-Ohio-61. In turn, pursuant to Crim.R. 52(A), any error, defect, irregularity or variance that does not affect the accused's substantial rights shall be disregarded as harmless error. *State v. MaCausland*, Butler App. No. CA2007-10-254, 2008-Ohio-5660, ¶25. A finding of harmless error is appropriate where there is "overwhelming evidence of guilt" or "some other indicia that the error did not contribute to the conviction." *State v. Sims*, Butler App. No. CA2007-11-300, 2009-Ohio-550, ¶34, quoting *State v. Ferguson* (1983), 5 Ohio St.3d 160, 166, fn. 5. In other words, an error excluding evidence is harmless "if such evidence would not negate the overwhelming proof of defendant's guilt." *State v. Johnson*, Marion App. No. 9-10-47, 2011-Ohio-994, ¶64, quoting *State v. Gilmore* (1986), 28 Ohio St.3d 190.

{¶18} Initially, we note that Reynolds' testimony indicating McKenzie told him that he

intended to go to appellant's house and kill him later that day was reminiscent of the testimony provided by Duff Crum. Crum, who was also a neighborhood acquaintance of both appellant and McKenzie, testified that he overheard McKenzie tell appellant that he was going to kill him while the two stood outside the local thrift store. In turn, because the excluded testimony was merely cumulative to the testimony provided by Crum that was properly admitted by the trial court, it provided little, if any, additional probative value supporting appellant's defense. Therefore, due to the cumulative nature of the excluded testimony, we find appellant simply cannot demonstrate any resulting prejudice.

{¶19} That said, regardless of its cumulative nature, even if the trial court had not erroneously excluded Reynolds' testimony, we find the state provided overwhelming evidence of appellant's guilt. Here, the state presented uncontroverted evidence indicating appellant stabbed McKenzie in the chest four times and inflicted ten additional abraded incised wounds all within a five by five inch area above his heart. The state also presented evidence from Jack Byrd, appellant's former cellmate, who testified that appellant admitted to stabbing McKenzie multiple times after McKenzie called him a "bitch" and refused to pay back money he was owed. In fact, while denying Byrd's claims, appellant even admitted to stabbing McKenzie in self-defense one time before he "blacked out." The physical evidence, however, simply did not support appellant's version of the events leading to McKenzie's death for he did not exhibit any defensive wounds and police did not find any signs of a struggle. In turn, because the state provided overwhelming evidence of appellant's guilt, we find any error the trial court committed by excluding Reynolds' testimony to be harmless. Therefore, appellant's first assignment of error is overruled.

{¶20} Assignment of Error No. 2:

{¶21} "QUESTIONS ABOUT APPELLANT'S SELF-DEFENSE CLAIMS SHOULD HAVE BEEN LEFT TO THE JURY, NOT PRE-DETERMINED BY THE TRIAL COURT WHO

REFUSED TO SUBMIT THE ISSUE FOR THE JURY'S CONSIDERATION."

{¶22} In his second assignment of error, appellant argues that the trial court erred by refusing to provide the jury with an instruction on self-defense. We disagree.

{¶23} Jury instructions are matters left to the sound discretion of the trial court. *State v. Harry*, Butler App. No. CA2008-01-013, 2008-Ohio-6380, ¶35, citing *State v. Guster* (1981), 66 Ohio St.2d 266, 271. This court, therefore, reviews the trial court's decision refusing to provide the jury with a requested jury instruction for an abuse of discretion. *State v. Gray*, Butler App. No. CA2010-03-064, 2011-Ohio-666, ¶23, citing *State v. Wolons* (1989), 44 Ohio St.3d 64, 68. As noted above, an abuse of discretion implies that the court's decision was unreasonable, arbitrary, or unconscionable, and not merely an error of law or judgment. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶130.

{¶24} Under Ohio law, self-defense is an affirmative defense a defendant must prove by a preponderance of the evidence. *State v. Smith*, Warren App. No. CA2010-05-047, 2011-Ohio-1476, ¶33. To establish self-defense in a case where a defendant used deadly force, such as the case here, "the defendant must prove: (1) he was not at fault in creating the situation giving rise to the affray; (2) he had a bona fide belief he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was the use of deadly force; and (3) he did not violate any duty to retreat or avoid the danger." *Gray* at ¶43, citing *State v. Robbins* (1979), 58 Ohio St.2d 74, paragraph two of the syllabus. If the defendant "fails to prove any one of these elements by a preponderance of the evidence he has failed to demonstrate that he acted in self-defense." *State v. Jackson* (1986), 22 Ohio St.3d 281, 284; *State v. Voss*, Warren App. No. CA2006-11-132, 2008-Ohio-3889, ¶54.

{¶25} A trial court does not err in failing to instruct the jury on self-defense where the evidence is insufficient to support the instruction. *State v. Rice*, Butler App. No. CA2003-01-015, 2004-Ohio-697, ¶26, citing *State v. Palmer*, 80 Ohio St.3d 543, 564, 1997-Ohio-312. In

turn, "[i]f the evidence brought forward generated only mere speculation of a self-defense claim, such evidence was insufficient to raise the affirmative defense, and submission of the issue to the jury was unwarranted." *State v. Martin*, Warren App. Nos. CA2002-10-111, CA2002-10-115, CA2002-10-116, 2003-Ohio-6551, ¶9. In determining whether a defendant has introduced sufficient evidence to warrant a jury instruction on self-defense, "the test to be applied is whether the defendant has introduced evidence that, if believed, is sufficient to raise a question in the minds of reasonable persons concerning the existence of the offense." *State v. Ford*, Butler App. No. CA2009-01-039, 2009-Ohio-6046, ¶19.

{¶26} In this case, after a thorough review of the record, we find no error in the trial court's decision refusing to provide the jury with an instruction on self-defense. Here, although appellant claims that his only means of escape from McKenzie was to use deadly force, the evidence presented clearly demonstrates otherwise. As appellant testified, when McKenzie would become "loud and * * * angry enough to hurt you," simply telling him that "you are going to call the police," a tactic that he had used previously, would diffuse the situation and cause McKenzie to leave. In fact, when the state asked appellant if McKenzie "basically had a button that you could push" to get him to leave by threatening to call the police, appellant testified affirmatively. Appellant, therefore, certainly had other means available to him that could have diffused the situation thereby alleviating the need for the use of deadly force. *Rice*, 2004-Ohio-697 at ¶28 (finding no error in trial court's decision refusing to instruct jury on self-defense where defendant had other means of escape besides stabbing victim in the chest five times). In turn, based on the facts of this case, because appellant could have simply told McKenzie that he was going to call the police in order to get McKenzie to leave, we find no error in the trial court's decision refusing to instruct the jury on self-defense. Appellant's second assignment of error, therefore, is overruled.

{¶27} Assignment of Error No. 3:

{¶28} "THE TRIAL COURT ERRED IN NOT GIVING A LESSER INCLUDED INSTRUCTION AS TO VOLUNTARY OR INVOLUNTARY MANSLAUGHTER."

{¶29} In his third assignment of error, appellant argues that the trial court erred by refusing to instruct the jury on involuntary manslaughter as a lesser-included offense of felony murder in violation of R.C. 2903.02(B). Appellant also argues that the trial court erred by refusing to instruct the jury on voluntary manslaughter as an inferior degree of murder in violation of R.C. 2903.02(A). These arguments lack merit.

{¶30} As noted above, jury instructions are matters left to the sound discretion of the trial court. *Harry*, 2008-Ohio-6380 at ¶35, citing *Guster*, 66 Ohio St.2d at 271. This court, therefore, reviews the trial court's decision refusing to provide the jury with a requested jury instruction for an abuse of discretion. *Gray*, 2011-Ohio-666 at ¶23, citing *Wolons*, 44 Ohio St.3d at 68.

{¶31} A jury instruction on a lesser-included offense is required only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction on the lesser-included offense. *State v. Carroll*, Clermont App. Nos. CA2007-02-030, CA2007-03-041, 2007-Ohio-7075, ¶136, citing *State v. Carter*, 89 Ohio St.3d 593, 600, 2000-Ohio-172. However, an instruction is not warranted simply because the defendant offers "some evidence" to establish the lesser-included offense. *Gray*, citing *State v. Shane* (1992), 63 Ohio St.3d 630, 632-633. Instead, there must be "sufficient evidence" to "allow a jury to *reasonably* reject the greater offense and find the defendant guilty on a lesser included (or inferior-degree) offense." (Emphasis sic.) *State v. Anderson*, Butler App. No. CA2005-06-156, 2006-Ohio-2714, ¶11, quoting *Shane* at 632-633. In other words, "[a] trial court does not abuse its discretion by not giving a jury instruction if the evidence is insufficient to warrant the requested instruction." *State v. Cutts*, Stark App. No. 2008CA000079, 2009-Ohio-3563, ¶72, citing *State v. Lessin*, 67 Ohio St.3d 487, 494, 1993-

Ohio-52. In making this determination, the trial court must consider the evidence in a light most favorable to the defendant. *State v. Braylock*, Lucas App. No. L-08-1433, 2010-Ohio-4722, ¶33, citing *State v. Smith*, 89 Ohio St.3d 323, 331, 2000-Ohio-166.

Involuntary Manslaughter

{¶32} Involuntary manslaughter is a lesser-included offense of felony murder. *State v. Thomas*, Lucas App. No. L-06-1331, 2009-Ohio-1748, ¶29, citing *State v. Lynch*, 98 Ohio St.3d 514, 2003-Ohio-2284, ¶79. However, although involuntary manslaughter is a lesser-included offense, based on the evidence presented in this case, we find no jury could have reasonably concluded that appellant's acts constituted anything other than felonious assault with a deadly weapon, the predicate offense supporting his felony murder charge. See *State v. Rader*, Butler App. No. CA2010-11-310, 2011-Ohio-5084, ¶51; *State v. Finley*, Hamilton App. No. C-061052, 2010-Ohio-5203, ¶30. As noted above, the state presented overwhelming evidence indicating appellant caused McKenzie's death by stabbing him in the chest with a knife four times and inflicting additional ten abraded incised wounds all within a five by five inch area above his heart. The knife appellant used to stab McKenzie to death certainly constitutes a deadly weapon. See *State v. Nichols*, Brown App. No. CA2009-10-038, 2010-Ohio-4566, ¶26; *State v. Cramer*, Butler App. No. CA2003-03-078, 2004-Ohio-1712, ¶28. Therefore, because the evidence did not reasonably support an acquittal on his felony murder charge and a conviction on the lesser-included offense of involuntary manslaughter, the trial court did not err by failing to instruct the jury as such. Accordingly, appellant's argument claiming the trial court erred by refusing to instruct the jury on involuntary manslaughter is overruled.

Voluntary Manslaughter

{¶33} Contrary to appellant's claims, voluntary manslaughter is not a lesser-included offense of murder, but instead, merely an inferior degree of murder. *Gray*, 2011-Ohio-666 at

¶33; *State v. Harrop*, Fayette App. No. CA2005-01-036, 2006-Ohio-6080, ¶11. Nevertheless, as with a lesser-included offense, "a defendant is entitled to an instruction on an inferior degree of the indicted offense when the evidence is such that a jury could both reasonably acquit him of the indicted offense and convict him of the inferior offense." *Harrop*, quoting *State v. Tyler* (1990), 50 Ohio St.3d 24, 37; *State v. Patterson*, Butler App. No. CA2001-01-011, at 21, 2002-Ohio-2065. In turn, "a defendant charged with murder is entitled to an instruction on voluntary manslaughter when the evidence presented at trial would reasonably support both an acquittal on the charged crime of murder and a conviction for voluntary manslaughter." *Shane*, 63 Ohio St.3d at 632; *Rice*, 2004-Ohio-697 at ¶31.

{¶34} Before giving a voluntary manslaughter instruction in a murder case, the trial court must determine "whether evidence of reasonably sufficient provocation occasioned by the victim has been presented to warrant such an instruction." *Shane* at 635; *Gray*, 2011-Ohio-666 at ¶35. For provocation to be reasonably sufficient, "it must be sufficient to arouse the passions of an ordinary person beyond the power of his or her control." *State v. Bainum* (Sept. 24, 2001), Butler App. No. CA99-12-217, at 5. In determining whether the provocation was reasonably sufficient to incite the use of deadly force, "the court must consider the emotional and mental state of the defendant and the conditions and circumstances that surrounded him at the time." *Rice* at ¶36, quoting *State v. Deem* (1988), 40 Ohio St.3d 205, 211.

{¶35} In this case, while appellant did testify that it is "kind of scary when someone is drunk and has a knife," fear alone "is insufficient to demonstrate the kind of emotional state necessary to constitute sudden passion or fit of rage." *State v. Perdue*, 153 Ohio App.3d 213, 2003-Ohio-3481, ¶12. Moreover, the evidence clearly indicates that appellant stabbed an intoxicated McKenzie after he secured the knife because McKenzie refused to stop "pushing" and "wailing" on him. This certainly does not rise to the level of reasonably

sufficient provocation to incite the use of deadly force. See *State v. Henry*, Montgomery App. No. 22510, 2009-Ohio-2068, ¶22-23; *State v. Hendrickson*, Athens App. No. 08CA12, 2009-Ohio-4416, ¶44-46; *State v. Bryan*, Gallia App. No. 03CA3, 2004-Ohio-2066, ¶25. Therefore, because the evidence did not reasonably support an acquittal on his murder charge and a conviction on voluntary manslaughter, we find no error in the trial court's decision refusing to instruct the jury as such. Accordingly, appellant's argument claiming the trial court erred by refusing to instruct the jury on voluntary manslaughter is also overruled.

{¶36} In light of the foregoing, having found no error in the trial court's refusal to instruct the jury on the lesser-included offense of involuntary manslaughter or voluntary manslaughter as an inferior degree of murder, appellant's third assignment of error is overruled.

{¶37} Assignment of Error No. 4:

{¶38} "THE PROSECUTOR'S INAPPROPRIATE COMMENTS, ALONG WITH THE OTHER ERRORS DISCUSSED, HAD A CUMULATIVE EFFECT OF DENYING APPELLANT'S FAIR TRIAL RIGHTS."

{¶39} In his fourth assignment of error, appellant argues that the state engaged in prosecutorial misconduct during its closing argument. Appellant also argues that he was denied a fair trial due to the cumulative errors committed by the trial court. These arguments lack merit.

{¶40} Initially, as it relates to his prosecutorial misconduct claim, appellant calls our attention to the following statement made by the state during its closing argument:

{¶41} "[THE STATE]: I hope your verdict reflects the truth and tells this defendant that here in Butler County, you can't stab somebody four times in the chest and get away with it."

{¶42} According to appellant, by making this statement, the state advanced an

impermissible "Golden Rule" argument by eliciting an "appeal for the jury to go from fact-finders to proclaiming moral judgments on behalf of the community." We disagree.

{¶43} When reviewing statements made during closing arguments for prosecutorial misconduct, a prosecutor is granted a certain degree of latitude. *State v. Bates*, Butler App. No. CA2009-06-174, 2010-Ohio-1723, ¶27, citing *State v. Smith* (1984), 14 Ohio St.3d 13, 13-14. In turn, prosecutorial misconduct will only be found when remarks made during closing were improper and those improper remarks prejudicially affected substantial rights of the defendant. *State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207, ¶62. The touchstone of the analysis is the fairness of the trial, not the culpability of the prosecutor. *State v. Morgan*, Clinton App. No. CA2008-08-035, 2009-Ohio-6050, ¶30, citing *State v. Lott* (1990), 51 Ohio St.3d 160, 166. In order to determine whether the remarks were prejudicial, the prosecutor's closing argument is reviewed in its entirety. *State v. Layne*, Clermont App. No. CA2009-07-043, 2010-Ohio-2308, ¶58, citing *State v. Treesh*, 90 Ohio St.3d 460, 464, 2001-Ohio-4.

{¶44} As this court recently stated, a "Golden Rule" argument "exists where counsel appeals to the jury to abandon their position of impartiality by imagining themselves in the position of one of the parties." *In re Johnson*, Butler App. No. CA2010-07-189, 2011-Ohio-2466, ¶18, fn. 1. In other words, as it relates more to the criminal context, a "Golden Rule" argument "essentially involves a request by the prosecutor that the jury accord a defendant the same treatment that the defendant accorded his victim." *State v. Hairston* (Jan. 18, 1984), Hamilton App. No. C-830127, 1984 WL 4184, *2. Such arguments, while generally prohibited, are "not per se prejudicial so as to warrant a new trial." *State v. Southall*, Stark App. No. 2008 CA 00105, 2009-Ohio-768, ¶115. Instead, the test is whether such an argument "prejudicially affected substantial rights of the defendant." *State v. Ross*, Montgomery App. No. 22958, 2010-Ohio-843, ¶126.

{¶45} After a thorough review of the record, we disagree with appellant's claim that this statement amounted to an impermissible "Golden Rule" argument. While appellant may claim otherwise, we find this statement simply cannot be interpreted as a request by the state for the jury to put themselves in the victim's shoes. See *State v. Robinson*, Lucas App. No. L-06-1182, 2008-Ohio-3498, ¶260-262 (finding prosecutor's request to bring justice to victim was not an impermissible "Golden Rule" argument where "prosecutor did not ask that the jury put itself in the shoes of the victim"). Instead, we find this statement amounts to nothing more than a request by the state for the jury to maintain community standards and return a finding of guilt based on the evidence presented. "A request that the jury maintain community standards by returning a conviction has been held to be a proper remark during closing argument." *State v. Holmes* (Oct. 21, 1991), Butler App. No. CA90-06-113, at 13, citing *State v. Williams* (1986), 23 Ohio St.3d 16, 20; *State v. Tackett*, Scioto App. No. 06CA3103, 2007-Ohio-6620, ¶32. Therefore, because the state's comment during its closing argument was proper, appellant's first argument is overruled.

{¶46} Next, as it relates to his cumulative error claim, appellant argues that the prosecutor's statement made during its closing argument, when "coupled with the trial court's erroneous exclusion of any instruction on [his] affirmative self-defense claim or lesser included charges," denied him a fair trial. We disagree.

{¶47} Under 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." *State v. Garner*, 74 Ohio St.3d 49, 64, 1995-Ohio-168, citing *State v. DeMarco* (1987), 31 Ohio St.3d 191, paragraph two of the syllabus. The doctrine is not applicable, however, "to cases where there has not been a finding of multiple instances of harmless error." *State v. Bai*, Butler App. No. CA2010-05-116, 2011-Ohio-2206, ¶156.

{¶48} As more thoroughly discussed above, due to the overwhelming evidence presented by the state supporting appellant's guilt, the trial court's decision to exclude Reynolds' testimony amounted to nothing more than harmless error. A review of the record has failed to establish any additional instances of harmless error in this case. Therefore, since the trial court's decision to exclude Reynolds' testimony was the only error, harmless or otherwise, we find the cumulative error doctrine to be inapplicable here. See *State v. McCullough*, Fayette App. Nos. CA2003-11-012, CA2007-04-014, 2008-Ohio-6384, ¶91; *State v. Murphy*, 173 Ohio App.3d 221, 2007-Ohio-4535, ¶47. Accordingly, appellant's second argument is also overruled.

{¶49} In light of the foregoing, having found no merit to either argument advanced by appellant under this assignment of error, appellant's fourth assignment of error is overruled.

{¶50} Judgment affirmed.

HENDRICKSON, P.J., and YOUNG, J., concur.

Young, J., retired, of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6(C), Article IV of the Ohio Constitution.