[Cite as *State v. McKinney*, 2012-Ohio-4521.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-08-162
	:	OPINION 10/1/2012
- vs -		
	:	
LEON H. McKINNEY,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2011-02-0240

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

Scott N. Blauvelt, 246 High Street, Hamilton, Ohio 45011, for defendant-appellant

YOUNG, J.

{¶ 1} Defendant-appellant, Leon H. McKinney, appeals his conviction from a trial by jury of one count of domestic violence, a felony of the fourth degree, against his 16-year-old son, Jarred.

{¶ 2} According to Jarred's testimony, on the morning of February 7, 2011, appellant came into the bedroom Jarred shared with his little brother and appeared to be "mad about

something." Appellant told Jarred to take the dog outside, but Jarred argued that it was not his turn. Appellant then yelled at Jarred to take the dog out and Jarred complied.

{¶ 3} Upon returning to his bedroom, Jarred found appellant removing clothes from the chest of drawers Jarred shared with his little brother. Appellant questioned Jarred about the disorganization in the drawers and the pair began arguing. After stating that he saw "what kind of game" Jarred wanted to play, appellant left the bedroom and returned a short time later with a leather belt. Jarred testified that appellant told him to take his sweatshirt off so that he could "get a whupping," but Jarred refused. According to Jarred, appellant then struck him twice in the back with the nonmetal end of the belt. Jarred attempted to grab appellant's arm to prevent a third strike but was forced down by appellant onto a nearby mattress on the floor. Jarred testified that appellant pinned Jarred's arms and legs down and struck him twice with a partially closed fist, once in the lip and once in the eye. Jarred's nose and lip began to bleed and he received a small cut near his left eye. During this altercation, Jarred attempted to fight off appellant by taking a swing at appellant, but stated that it "wasn't like a real swing, it was like to get off me."

{¶ 4} After this exchange, Jarred testified that he walked to school, where his nose began to bleed again and he was sent to the office. Hamilton Police Officer Adrian Jackson, a school resource officer at Hamilton High School, interacted with Jarred at this time. According to the testimony of Officer Jackson, Jarred appeared upset and had redness on his lip, under his eye, and on his back. After listening to Jarred recount the altercation, Officer Jackson made a report and appellant was arrested for domestic violence later that same day.

{¶ 5} Appellant also testified at trial regarding the altercation between himself and his son. According to appellant, Jarred had recently been punished for poor grades and bad behavior in the months leading up to February 7, 2011. In terms of punishment, Jarred was

required to wash the dishes on a daily basis, had lost the privilege of using his vehicle, cell phone, and video games, and was grounded.

{¶ 6} As to the events that occurred on February 7, 2011, appellant testified that he entered Jarred's bedroom and asked him to take the dog outside, but Jarred refused. After, again, telling Jarred to take the dog outside, Jarred complied, but did so while "huffing and puffing" and "stomping down the stairs." At that time, appellant noticed that his children's clothes had been haphazardly thrown into the chest of drawers. When Jarred returned to his bedroom, appellant questioned him about the clothing and an argument ensued. Appellant testified that he told Jarred to clean up the clothes and that he had until the end of the week to improve his grades. Appellant told Jarred that if he did not improve his grades, he would get a "whupping." Appellant testified that Jarred replied, "you won't do nothing to me," at which point appellant left the room and returned with the belt, telling Jarred that if he wanted to be a "big bad Billy" he was going to "get a whupping." Appellant then instructed Jarred to take his pants off, but Jarred refused. Appellant attempted to strike Jarred in the buttocks with the belt but testified that Jarred lunged at him and tackled him onto the nearby mattress. Appellant testified that he feared Jarred was going to harm him because Jarred had blackened his mother's eye two years earlier. Therefore, appellant restrained Jarred on the mattress and smacked him across the face "with an open hand." Afterwards, he told Jarred to go to school. Appellant admitted during his testimony that he did not receive any injuries from the altercation and no visible signs of injury were found on appellant when he was arrested.

{¶ 7} Appellant was indicted on March 16, 2011 and charged with a single count of domestic violence in violation of R.C. 2919.25(A). After a jury trial, appellant was found guilty and sentenced to a five-year term of community control. From this conviction, appellant appeals, raising five assignments of error. For ease of discussion, we shall address

appellant's assignments of error out of order.

{¶ 8} Assignment of Error No. 2:

{¶ 9} THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT AND ABUSED ITS DISCRETION IN LIMITING THE ADMISSION OF RELEVANT EVIDENCE AT TRIAL.

{¶ 10} In his second assignment of error, appellant argues that the trial court improperly limited the evidence permitted at trial regarding appellant's disciplinary history with Jarred. Specifically, appellant argues that the jury was prevented from weighing the totality of the circumstances in determining whether appellant exercised proper and reasonable parental discipline during the altercation with Jarred.

{¶ 11} "The admission or exclusion of relevant evidence rests within the sound discretion of the trial court." *State v. Roten*, 149 Ohio App.3d 182, 2002-Ohio-4488, ¶ 5 (12th Dist.), quoting *State v. Sage*, 31 Ohio St.3d 173 (1987), paragraph two of the syllabus. "A trial court has broad discretion in determining whether to admit or exclude evidence, and unless the court abused its discretion and materially prejudiced a party, the decision will stand." *Id.* at ¶ 6; *State v. Withers*, 44 Ohio St.2d 53, 55 (1975). An abuse of discretion is not merely an error of law or judgment, but an implication that the court's attitude was unreasonable, arbitrary, or unconscionable. *Roten* at ¶ 6.

{¶ 12} R.C. 2919.25(A) provides that "no person shall knowingly cause or attempt to cause physical harm to a family or household member." However, this statute "does not prohibit a parent from properly disciplining his or her child." *State v. Sellers*, 12th Dist. No. CA2011-05-083, 2012-Ohio-676, ¶ 15, citing *State v. Suchomski*, 58 Ohio St.3d 74, 75 (1991). "The only prohibition is that a parent may not cause 'physical harm' as that term is defined in R.C. 2901.01." *State v. Zielinski*, 12th Dist. No. CA2010-12-121, 2011-Ohio-6535, ¶ 23. R.C. 2901.01(A)(3) defines "physical harm to persons" as "any injury, illness, or other

physiological impairment, regardless of its gravity or duration." "'Injury' is defined as the invasion of any legally protected interest of another." (Internal quotations omitted.) *Id.*

{¶ 13} "A child does not have any legally protected interest that is invaded by proper and reasonable parental discipline." *Id.* at ¶ 24; *State v. Luke*, 3d Dist. No. 14-10-26, 2011-Ohio-4330, ¶ 21. Thus, "a parent may use physical punishment as a method of discipline without violating the domestic violence statute as long as the discipline is proper and reasonable under the circumstances." *State v. Thompson*, 2nd Dist. No. 04CA30, 2006-Ohio-582, ¶ 29. "'Proper' has been defined as 'suitable or appropriate' and 'reasonable' has been defined as 'not extreme or excessive.'" *Zielinski* at ¶ 24.

{¶ 14} Whether particular conduct constitutes proper and reasonable parental discipline is a "question that must be determined from the totality of all of the relevant facts and circumstances." *Thompson* at ¶ 31. In analyzing the totality of the circumstances, a fact finder should consider: (1) the child's age, (2) the child's behavior leading up to the discipline, (3) the child's response to prior noncorporal punishment, (4) the location and severity of the punishment, and (5) the parent's state of mind while administering the punishment. *Zielinski* at ¶ 25, citing *Luke* at ¶ 21.

{¶ 15} Appellant asserts that the trial court erred in limiting the evidence appellant could introduce regarding Jarred's prior disciplinary history, including drug use. We do not find that this harmed appellant's case in any way.

{¶ 16} First, whether a child is abusing drugs is not applicable to the totality of the circumstances test unless the child was, or the parent believed the child was, under the influence of drugs at the time of the altercation. In this case, appellant does not argue that Jarred was under the influence of drugs on the morning of February 7, 2011. Rather, appellant sought to introduce this evidence to demonstrate Jarred's past disciplinary problems. As Jarred's drug use does not go to his age, his behavior leading up to the

altercation, his response to prior noncorporal punishment, the location or severity of his punishment, or appellant's state of mind while punishing Jarred, whether or not Jarred abused drugs has no application in the totality of the circumstances test.

{¶ 17} Second, appellant was permitted to introduce evidence going to all five totality of the circumstances factors. Jarred testified that he was 16 years old at the time of the altercation. He also testified that he and appellant were arguing prior to the altercation. Appellant testified that Jarred had had a "disrespectful attitude" in the time leading up to February 7, 2011, and that Jarred's grades had dropped from a 3.0 grade point average to the D and F range. Due to Jarred's grades and attitude, appellant testified that he punished Jarred in a number of ways including grounding Jarred, making him do dishes every night, and taking away Jarred's vehicle, cell phone, television, and video games. Appellant further testified regarding a past instance where Jarred had caused his mother to have a black eye. Thus, appellant was permitted to present evidence relating to all factors of the totality of the circumstances test.

{¶ 18} Finally, it should be noted that the trial court never explicitly limited the testimony at trial except in regard to the alleged drug abuse. The trial court stated that evidence of Jarred's disciplinary history would be "very closely confined in time" to the altercation and that the trial court would not allow appellant to "put [Jarred] on trial for everything that he may have done wrong his entire relationship with [appellant]." However, the trial court stated that appellant's counsel could "explore" Jarred's disciplinary history and if the trial court felt counsel was going too far, it would instruct him to move on. From our review of the record, it appears that the only testimony which was precluded by the trial court related to Jarred's alleged drug abuse. Furthermore, appellant limited his own testimony by stating that he was "not allowed to speak about" certain things "due to the Court's limitation." Thus, it was mainly appellant, and not the trial court, who limited the testimony at trial.

{¶ 19} Based upon the foregoing, the jury was not prevented from gaining a full picture of the events leading up to the altercation and the trial court did not err in limiting the testimony at trial.

{¶ 20} Accordingly, appellant's second assignment of error is overruled.

{¶ 21} Assignment of Error No. 3:

{¶ 22} THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT AND ABUSED ITS DISCRETION IN REFUSING TO INSTRUCT THE JURY ON THE AFFIRMATIVE DEFENSE OF SELF DEFENSE, IN VIOLATION OF HIS RIGHT TO A JURY TRIAL UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 5 OF THE OHIO CONSTITUTION.

{¶ 23} In this third assignment of error, appellant argues that the trial court erred in refusing to give a self-defense instruction to the jury.

{¶ 24} "Jury instructions are matters left to the sound discretion of the trial court." *State v. Tucker*, 12th Dist. No. CA2010-10-263, 2012-Ohio-139, ¶ 23. Therefore, an appellate court "reviews the trial court's decision refusing to provide the jury with a requested jury instruction for an abuse of discretion." *Id.*; *State v. Wolons*, 44 Ohio St.3d 64, 68 (1989). As noted above, a trial court abuses its discretion when it acts unreasonably, arbitrarily, or unconscionably. *Tucker* at ¶ 23.

{¶ 25} "A trial court must give the jury all instructions that are relevant and necessary for the jury to weigh the evidence and fulfill its duty as the fact finder." *State v. Hamilton*, 12th Dist. No. CA2001-04-098, 2002-Ohio-3862, ¶ 8; *State v. Comen*, 50 Ohio St.3d 206, 210 (1990). However, a trial court does not err in failing to provide a certain jury instruction "where the evidence is insufficient to support the instruction." *State v. Burchett*, 12th Dist. Nos. CA2003-09-017, CA2003-09-018, 2004-Ohio-4983, ¶ 26. "If 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*, 12th Dist. Nos. CA2002-10-111, CA2002-10-115, CA2002-10-116, 2003-Ohio-6551, ¶ 9; *Tucker* at ¶ 25. "In determining whether a defendant has introduced sufficient evidence to successfully raise the affirmative defense of self-defense, a reviewing court must evaluate the evidence, 'which, if believed, would raise a question in the minds of reasonable men concerning the existence of such issue.'" *State v. Rice*, 12th Dist. No. CA2003-01-015, 2004-Ohio-697, ¶ 26, quoting *State v. Melchior*, 56 Ohio St.2d 15 (1978), paragraph one of the syllabus.

{¶ 26} In order to prove the affirmative defense of self-defense, appellant must establish: (1) that he was not at fault in creating the situation giving rise to the affray, (2) that he had a bona fide belief that he was in imminent danger of bodily harm and that his only means of escape from such danger was in the use of such force, and (3) that he did not violate any duty to retreat or avoid the danger. *State v. Belanger*, 190 Ohio App.3d 377, 2010-Ohio-5407, ¶ 4 (3rd Dist.); *Melchoir* at 21. If appellant "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*, 22 Ohio St.3d 281, 284 (1986).

{¶ 27} After a thorough review of the record, we find no error in the trial court's refusal to give a jury instruction on the affirmative defense of self-defense. Appellant essentially argues that he was exercising proper and reasonable parental discipline when he struck Jarred with the belt, but then acted in self-defense once Jarred tackled him and appellant struck Jarred across the face. Yet, the evidence at trial establishes that appellant initiated the altercation with Jarred, that appellant received no injuries during the altercation, and that appellant was only in fear of injury when Jarred tackled appellant, not when appellant struck Jarred in the face.

{¶ 28} Appellant's testimony was as follows:

Q. Okay. Did you – did you have reason to believe that he was trying to harm you when he came at you?

A. When he tackled me, yes, because he had blacked his mother's eye when I got custody of him.

* * *

Q. Did [Jarred] try to throw any punches at you?

A. Yes, when he tackled me, he proceeded to try to mount me, and at that point, I had to physically defend myself. My younger son's bed is on the floor, so when he tackled me, my feet were tripped by the mattress that was laying there. So I was on my back, and he was coming up towards me still. At that point, I had to flip him over. When I flipped him over, he was kneeing, he was kicking, he swung at me. At that point I had to lay out on him to refrain from getting kicked and to refrain him from punching me.

{¶ 29} Appellant also testified on cross-examination as follows:

Q. Okay. You also hit Jarred with your hand?

A. At the point where he was out of control, yes.

Q. Okay. I thought – but you were defending yourself at that point, right?

A. Yes.

Q. While you were on top of your son hitting him, you were defending yourself?

A. I smacked him to get him under control because he was still kicking. He was still trying to punch.

* * *

Q. Mr. McKinney, your position is that you had to defend yourself against Jarred, is that correct?

A. In the end, yes.

Q. Okay. And you were defending yourself when you struck him in the face?

A. At the point that I had him and he was out of control, I was not defending myself. I was trying to get him to realize you are

out of control.

{¶ 30} Moreover, "the self-defense affirmative defense generally admits the facts claimed by the prosecution and then relies on independent facts or circumstances which the [appellant] claims exempt [him] from liability." *Zielinski*, 2011-Ohio-6535 at ¶ 29, citing *State v. Poole*, 33 Ohio St.2d 18, 19 (1973). Here, appellant admits that he struck Jarred once with the belt and slapped him once across the face, but argues that his actions did not cause the type of injuries Jarred suffered and that those injures were a result of appellant and Jarred falling to the ground when Jarred tackled appellant.

{¶ 31} Based upon the foregoing, we cannot say that the trial court acted unreasonably, arbitrarily, or unconscionably in refusing to instruct the jury on the affirmative defense of self-defense. Appellant was the initial aggressor, appellant did not suffer any injury, and appellant stated that, at the time he struck Jarred in the face, he was only trying to get Jarred under control.

{¶ 32} Accordingly, appellant's third assignment of error is overruled.

{¶ 33} Assignment of Error No. 1:

{¶ 34} THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT IN ENTERING A GUILTY VERDICT FOR DOMESTIC VIOLENCE WHERE SAID VERDICT WAS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 35} In his first assignment of error, appellant argues that the domestic violence conviction was against the manifest weight of the evidence where the weight of the evidence at trial established that appellant was initially engaged in reasonable and proper parental discipline and, later, began acting in self-defense to protect himself from physical harm.

{¶ 36} In considering whether a conviction was against the manifest weight of the evidence, an appellate court "must weigh the evidence and all reasonable inferences from it, consider the credibility of the witnesses and determine whether in resolving conflicts, 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." *State v. Coldiron*, 12th Dist. Nos. CA2003-09-078, CA2003-09-079, 2004-Ohio-5651, ¶ 24; *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52. "An appellate court will not reverse a judgment as being against the manifest weight of the evidence in a jury trial unless it unanimously disagrees with the jury's resolution of any conflicting testimony. *Coldiron* at ¶ 25; *Thompkins* at 389. The discretionary power to grant a new trial should only be exercised in the exceptional case in which the evidence weighs heavily against the conviction. *Thompkins* at 387.

{¶ 37} As noted above, appellant argues that the affirmative defenses of proper and reasonable parental discipline and self-defense apply in this case. As we have determined the trial court did not err in limiting the evidence or declining to provide a self-defense jury instruction, we shall review appellant's manifest weight argument only as to the evidence presented at trial.

{¶ 38} To reiterate, R.C. 2919.25(A) provides that "no person shall knowingly cause or attempt to cause physical harm to a family or household member." Physical harm includes "any injury, * * * regardless of its gravity or duration." R.C. 2901.01(A)(3). "'Injury' is the invasion of any legally protected interest of another." *Zielinski*, 2011-Ohio-6535 at ¶ 23.

{¶ 39} In this case, the jury heard testimony from Jarred and appellant, as well as Officer Jackson, who conversed with and observed Jarred a few hours after the altercation. The arresting officer also testified regarding his observations of appellant. The testimony revealed that Jarred and appellant argued on the morning of February 7, 2011. During the argument, appellant acquired a belt and ordered Jarred to remove his clothing so that he could "get a whupping." Appellant struck Jarred with the belt before Jarred moved towards appellant. Jarred and appellant struggled, fell onto a nearby mattress, and appellant pinned Jarred underneath him, trapping his arms and legs. Appellant then struck Jarred in the face.

Jarred testified that he was struck in the back twice by the belt and struck in the face twice by appellant's partially closed fist. Appellant testified that he struck Jarred with the belt once, but he was not sure where. Appellant also admitted to slapping Jarred in the face once with an open hand.

{¶ 40} As to Jarred's injuries, Jarred and Officer Jackson testified that Jarred's lip and left eye were red, that Jarred had a small cut above his left eye, and a red mark across his back. Photographs of Jarred's injuries were submitted as exhibits and were available to the jury.

{¶ 41} In reviewing a record, we are mindful that the jury was in the best position to judge the credibility of the witnesses and the weight to be given the evidence. *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus. Based upon the facts of this case, we cannot say that the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed. A miscarriage of justice does not occur "simply because the jury believed the prosecution testimony." *State v. Bates*, 12th Dist. No. CA2009-06-174, 2010-Ohio-1723, ¶ 11.

{¶ 42} Accordingly, appellant's first assignment of error is overruled.

{¶ 43} Assignment of Error No. 4:

{¶ 44} APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION, WHICH DENIAL RESULTED IN PREJUDICE.

{¶ 45} In his fourth assignment of error, appellant argues that he was denied effective assistance of counsel in violation of his constitutional rights. Specifically, appellant contends that trial counsel's failure to make a motion for acquittal pursuant to Crim.R. 29(A), either at the close of the state's evidence or at the close of all evidence, unfairly prejudiced appellant

and prevented appellant from raising a sufficiency argument on appeal.

{¶ 46} "To establish a claim of ineffective assistance of counsel, a defendant must show that his or her counsel's actions were outside the wide range of professionally competent assistance, and that prejudice resulted by reason of counsel's actions." *State v. Ullman*, 12th Dist. No. CA2002-10-110, 2003-Ohio-4003, ¶ 43, citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984). Counsel's performance will not be deemed ineffective unless the appellant demonstrates that "counsel's representation fell below an objective standard of reasonableness and that there exists a reasonable probability that, were it not for counsel's errors, the result of the proceeding would have been different." (Internal quotation omitted.) *Id.*; *Strickland* at 688; *State v. Bradley*, 42 Ohio St.3d 136, 143 (1989). "A reasonable probability is 'a probability sufficient to undermine confidence in the outcome of the proceeding.'" *State v. Fields*, 102 Ohio App.3d 284 (12th Dist.1995), quoting *Strickland* at 694.

{¶ 47} Appellant contends that defense counsel's failure to make a Crim.R. 29(A) motion for acquittal constituted ineffective assistance of counsel because appellant is now prevented from raising a sufficiency argument on appeal. This argument is flawed, however, due to this court's recent decision in *State v. Blake*, 12th Dist. No. CA2011-07-130, 2012-Ohio-3124.

{¶ 48} In *Blake*, this court held that, "as in a non-jury trial, the defendant preserves his right to object to the alleged insufficiency of the evidence by entering a 'not guilty' plea." *Id.* at ¶ 50; *State v. Jones*, 91 Ohio St.3d 335, 346 (2001). Although *Blake* involved a defendant's failure to *renew* a Crim.R. 29(A) motion for acquittal, we find that the same logic applies where a defendant fails to make the motion at all. *See State v. Cooper*, 170 Ohio App.3d 418 (4th Dist.2007); *State v. Pepin-McCaffrey*, 186 Ohio App.3d 548 (7th Dist.2010); *State v. Good*, 9th Dist. Nos. 10CA0056, 10CA0057, 2011-Ohio-5077; *State v. Schuyler*, 2d

Dist. No. 11CA0046, 2012-Ohio-2801. Therefore, defense counsel's conduct was not ineffective in failing to make a Crim.R. 29(A) motion for acquittal, as such a failure does not waive a sufficiency claim upon appeal.

{¶ 49} Additionally, we note that had appellant made a sufficiency argument in his appeal, the argument would have been overruled. As we discussed in appellant's first assignment of error, appellant's conviction was not against the manifest weight of the evidence. Because a finding that a conviction is supported by the weight of the evidence is also dispositive of the issue of sufficiency, we would have found that sufficient evidence existed at trial to sustain appellant's conviction. *See State v. Wilson*, 12th Dist. No. CA2006-01-007, 2007-Ohio-2298, ¶ 35.

{¶ 50} Accordingly, appellant's fourth assignment of error is overruled.

{¶ 51} Assignment of Error No. 5:

{¶ 52} THE CUMULATIVE EFFECT OF MULTIPLE ERRORS PREJUDICED APPELLANT, DENYING HIM HIS RIGHT TO A FAIR TRIAL.

{¶ 53} In his fifth and final assignment of error, appellant argues that, even if we should determine that the individual assigned errors were harmless, the cumulative impact of these errors resulted in unfair prejudice to appellant.

{¶ 54} "According 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 the numerous instances of trial court error does not individually constitute a cause for reversal.'" *State v. McClurkin*, 12th Dist. No. CA2007-03-071, 2010-Ohio-1938, ¶ 105, quoting *State v. Garner*, 74 Ohio St.3d 49, 64, 1995-Ohio-168. However, appellant has not shown that any errors of law occurred during his trial. Consequently, "we fail to see how the absence of prejudicial error can rise to the level of cumulative error." *State v. McGuire*, 12th Dist. No. CA95-01-001, unreported, 1996 WL 174609, *14 (Apr. 15,

1996); *McClurkin* at ¶ 106.

{¶ 55} Accordingly, appellant's fifth and final assignment of error is overruled.

{¶ 56} Judgment affirmed.

HENDRICKSON, P.J., and RINGLAND, 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.