Appendix A

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO Appellee v. CHRISTOPHER L. SMITH Appellant	C.A. No. 29597 Trial Court Case No. 2019 CR 04182 **ORDER ON APPLICATION FOR REOPENING**

PER CURIAM:

{¶ 1} Pursuant to App.R. 26(B), Christopher L. Smith has filed an application for reopening, alleging ineffective assistance of appellate counsel. According to Smith, his appellate attorney should have raised ten additional assignments of error. For the following reasons, Smith's application is denied.

I. Standard for Application for Reopening

{¶ 2} To warrant reopening a direct appeal, an applicant must demonstrate that "there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." App.R. 26(B)(5). The Ohio Supreme Court has held that the two-prong analysis set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), is the appropriate standard to assess a request for

reopening under App.R. 26(B)(5). *State v. Leyh*, 166 Ohio St.3d 365, 2022-Ohio-292, 185 N.E.3d 1075, ¶ 17; *State v. Spivey*, 84 Ohio St.3d 24, 701 N.E.2d 696 (1998), citing *State v. Reed*, 74 Ohio St.3d 534, 535, 660 N.E.2d 456 (1996).

{¶ 3} Pursuant to this standard, Smith must prove that his appellate counsel's performance was objectively unreasonable and that there was a "reasonable probability" that, but for counsel's unprofessional errors, the outcome of the appeal would have been different. *See Leyh* at ¶ 18; App.R. 26(B)(2)(d). In addressing Smith's application, we must determine whether there is a "genuine issue" as to whether he was deprived of the effective assistance of counsel on appeal. App.R. 26(B)(5). A genuine issue exists if there are "legitimate grounds" to support a claim of ineffective assistance of appellate counsel. *Leyh* at ¶ 25.

{¶ 4} An application for reopening must be filed in the court of appeals within 90 days from the journalization of the appellate judgment, unless the applicant shows good cause for filing at a later time. App.R. 26(B)(1). Smith timely filed his application on March 11, 2024.

II. Procedural History

{¶ 5} In August 2022, a jury found Smith guilty of four counts of murder, three counts of felonious assault (serious physical harm), three counts of felonious assault (deadly weapon), two counts of having weapons while under disability (prior offense of violence), and two counts of having weapons while under disability (prior drug conviction). The murder and felonious assault counts contained three-year firearm specifications. The charges stemmed from two shootings that occurred near each other but several hours apart on December 5, 2019. Counts One through Eight related to the shooting death of

Brandon Harris and the non-fatal shooting of William Earnest at approximately 3:00 a.m. at Rick's Jazz Club, located at 1832 Lakeview Avenue in Dayton. Counts Nine through Fourteen arose out of the shooting death of Clarence Brown at approximately 10:10 a.m. the same day in front of the Save Food Super Market, located behind the jazz club at 1829 Germantown Street.

{¶ 6} On September 2, 2022, after merging several counts and specifications, the trial court sentenced Smith to 15 years to life in prison for Harris's murder, plus three years for the firearm specification (Count 3), a minimum of two years and a maximum of three years for the felonious assault of Earnest (Count 5), 18 months for each count of having weapons while under disability (Counts 7 and 10), and 15 years to life for Brown's murder, plus three years for the firearm specification (Count 13). Counts 3, 5, and 13 were to be served consecutively. Smith's aggregate sentence was a minimum of 38 years to life in prison to a maximum of 39 years to life in prison. Smith was also ordered to pay restitution of $3,866 and $367.50 for the costs of extradition.

{¶ 7} Smith raised seven assignments of error in his direct appeal. He claimed that (1) the trial court erred in failing to sever the trials for the jazz club and food market offenses; (2) the trial court erred in failing to suppress eyewitness identifications, evidence from his Trotwood residence, and evidence from his cell phone; (3) the trial court erred in overruling his motion for the State to disclose all confidential informants referred to in the search warrant affidavit; (4) his convictions were based on insufficient evidence and against the manifest weight of the evidence; (5) the court erred in denying his motions for a mistrial and, alternatively, for a new trial; (6) his constitutional rights were violated when the trial judge met with jurors before deliberations; and (7) his right to a fair trial was

violated due to prosecutorial misconduct. We overruled each assignment of error and affirmed his convictions. *State v. Smith*, 2d Dist. Montgomery No. 29597, 2023-Ohio-4565.

{¶ 8} Smith now seeks to reopen his direct appeal to raise ten additional assignments of error. He claims that: (1) the jury pool violated his right to equal protection; (2) his right to a fair trial was violated by the prosecutor's failure to correct knowingly false testimony; (3) cumulative errors deprived him of a fair trial; (4) his right to a fair trial was violated by the trial court's limiting the voir dire process; (5) the trial court erred in allowing evidence in violation of Evid.R. 403; (6) the trial court violated his right to due process by failing to order correction of misleading testimony; (7) the trial court erred in classifying him as a sex offender; (8) the trial court erred in allowing the firearm examiner to testify as an expert; (9) the prosecutor engaged in misconduct during rebuttal closing argument; and (10) the trial court failed to give a proper jury instruction on reasonable doubt. We will address them in an order that facilitates our analysis.

III. Jury Pool / *Batson* Challenge

{¶ 9} In his first proposed assignment of error, Smith claims that he objected in the trial court that the jury pool was predominantly White and would be prejudicial. He argues that the trial court erred in failing to apply the three-step analysis set forth in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). In his supporting affidavit, Smith states that his attorney made an objection based on *Batson* during voir dire, but the objection does not appear in the transcripts. He indicates that an agreed statement pursuant to the appellate rules would be requested if the matter were reopened.

{¶ 10} In response, the State asserts that the record does not contain a transcript

of voir dire or trial counsel's subsequent exercise of peremptory challenges. The State argues that Smith's appellate counsel was not deficient for failing to raise an issue that was not supported by the record. However, contrary to the State's assertion, the record does contain a transcript of jury selection. Voir dire began on page 331 of the trial transcript, with challenges for cause beginning on page 481 and peremptory challenges beginning on page 496.

{¶ 11} We find no suggestion in the record that defense counsel objected to the jury pool as a whole, and we infer that Smith's proposed assignment of error relates to the State's second peremptory challenge, which was used against Juror #2. The transcript shows that a portion of defense counsel's statements about that juror were inaudible, but the prosecutor's response and discussion indicates that defense counsel made a *Batson* challenge. The transcript reads:

> [DEFENSE COUNSEL]: * * * what happened to the young guy that was the social media executive? Who was that?
>
> THE COURT: The State used their peremptory on him.
>
> UNIDENTIFIED FEMALE SPEAKER 2: What was his last name?
>
> [PROSECUTOR]: Mr. [ ].
>
> THE BAILIFF: He was the number 2 and then they just took him off.
>
> [DEFENSE COUNSEL]: All right. All right. So let's do the (indiscernible).
>
> * * *
>
> THE COURT: You're – okay. State.
>
> [PROSECUTOR]: I think it's actually to them (indiscernible) make a showing, but let me explain my race-neutral reasons. He is the one who

called me back and said, oh, I forgot I have this second job. I'm a barback and I intend to go to work every night. He gets done at 3 and we start up court at – he said he hadn't been to sleep yet today. We start up court at 8:30 most mornings, or 9:00, and he will have just been getting home at 3. And I don't imagine going right to bed after working a full shift, and he said he would struggle to focus. This wasn't something – this isn't his normal time, and it would be a struggle for him. So I think he set out that he's not going to be able to focus on this. That's my race-neutral reason.

[DEFENSE COUNSEL]: Okay. He said he would be focused, but I kind of agree with you.

THE COURT: Okay.

[DEFENSE COUNSEL]: He said he could focus – he said he could focus. She asked him; he said he could focus, and he would be willing to be here, but –

[PROSECUTOR]: He said he's not used to sleeping (indiscernible).

[DEFENSE COUNSEL]: He's not used to sleeping much. And again, that would be a concern for the State if he's not going to be attentive, in my opinion.

THE COURT: I would think it would be a concern for everybody if he's not going to be able to pay attention.

[DEFENSE COUNSEL]: Yeah. Yeah. If he's not going to be attentive.

THE COURT: Right.

[DEFENSE COUNSEL]: So I understand that, but he did not say – he did

say that he would be here, that he could – that he could do it, he could be fair and impartial. He did say that.

[PROSECUTOR]: I'm not moving him for cause.

THE COURT: Right.

[PROSECUTOR]: Actually, I –

[DEFENSE COUNSEL]: I know. I know. I got you. I heard you.

THE COURT: I expected something like this. I expected somebody to move for cause on him, actually.

[DEFENSE COUNSEL]: I heard you. I said I kind of agree with you.

THE COURT: So I'm going to rule on (indiscernible) challenge.

Trial Tr. 501-503. It appears that the trial court overruled defense counsel's objection.

{¶ 12} *Batson* established a three-step analysis for trial courts to decide claims of race-based challenges to jurors:

> First, a defendant must make a prima facie case that the prosecutor is engaged in racial discrimination. Second, if the defendant satisfies that burden, the prosecutor must provide a racially neutral explanation for the challenge. Finally, the court must decide, based on all the circumstances, whether the defendant has proved purposeful racial discrimination. In doing so, the court must consider the circumstances of the challenge and assess the plausibility of the prosecutor's explanation in order to determine whether it is merely pretextual.

State v. Johnson, 144 Ohio St.3d 518, 2015-Ohio-4093, 45 N.E.3d 208, ¶ 21. "Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the

trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." *Hernandez v. New York*, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991); *see also State v. Evans*, 2d Dist. Montgomery No. 27178, 2017-Ohio-8184, ¶ 27 ("The prosecutor's articulation of multiple race-neutral reasons for the peremptory strike renders moot whether Evans established the first step of a prima-facie case.").

{¶ 13} "Review of a *Batson* claim largely hinges on issues of credibility. Accordingly, we ordinarily defer to the findings of the trial court. * * * Whether a party intended to racially discriminate in challenging potential jurors is a question of fact, and in the absence of clear error, we will not reverse the trial court's determination." *Hicks v. Westinghouse Materials Co.*, 78 Ohio St.3d 95, 102, 676 N.E.2d 872 (1997); *State v. Smith*, 2d Dist. Montgomery No. 27585, 2018-Ohio-2567, ¶ 34.

{¶ 14} We find no ineffective assistance of appellate counsel based on counsel's failure to challenge the trial court's *Batson* analysis on direct appeal. Although defense counsel was not asked to make a prima facie case, the prosecutor provided a racially neutral explanation for dismissing Juror #2, namely that the prospective juror's work and sleep schedules would likely negatively affect his ability to concentrate on the trial. Defense counsel agreed that his schedule raised concerns. We find no reasonable probability that Smith's proposed first assignment of error would have been successful had it been raised on direct appeal.

IV. Time Limitation on Voir Dire

{¶ 15} Smith's fourth assignment of error asserts that the trial court denied him a fair trial by limiting voir dire to 75 minutes per side. He argues that the limitation removed

the opportunity to effectively question and examine prospective jurors.

{¶ 16} R.C. 2945.27 requires the trial judge to "examine the prospective jurors under oath or upon affirmation as to their qualifications to serve as fair and impartial jurors" and to "permit reasonable examination of such jurors by the prosecuting attorney and by the defendant or his counsel." *See also* Crim.R. 24(B). The manner in which voir dire is conducted falls within the trial court's discretion. *State v. Lorraine*, 66 Ohio St.3d 414, 418, 613 N.E.2d 212 (1993).

{¶ 17} In this case, the trial court made initial remarks and asked numerous questions related to matters that could warrant excusing a juror for cause. Trial Tr. 331-370. The 75-minute time limit applied equally to the State and the defense, which removes an inference of prejudice. *See State v. Thompson*, 9th Dist. Wayne No. 15AP0016, 2016-Ohio-4689, ¶ 18. Nothing in the record suggests that defense counsel lacked sufficient time to thoroughly question the prospective jurors. We find no genuine issue of ineffective assistance of appellant counsel based on counsel's failure to challenge the trial court's time limitation for voir dire.

V. State's Failure to Correct False or Misleading Testimony

{¶ 18} In his second proposed assignment of error, Smith contends that his appellate counsel should have raised on appeal that the State failed to correct false or misleading testimony from several witnesses.

A. Detective Steele

{¶ 19} Smith's application asserts that Detective Walter Steele, the lead detective, misled the jury in his testimony about .40 caliber red tip bullets found inside Smith's home. Smith states that the detective knew that the bullets found at the scene were Hornady

brand, which was different from the live bullets found at his residence, and that he intentionally did not mention the brand of the bullets found in Smith's home. Smith's argument misstates Detective Steele's trial testimony.

{¶ 20} The evidence at trial established that the three victims were shot with Hornady brand .40 S&W bullets; the bullets had red tips consistent with the Flex Tip that Hornady uses on some ammunition. Detective Steele testified that he located a magazine from a Glock firearm on the dining room table in Smith's residence. This magazine had "a couple live rounds * * * that [were] stamped .40 caliber." Trial Tr. 1415; *see* State's Ex. 73. Steele acknowledged that .40 caliber firearms were common and that the live rounds could not be matched to the bullets used in the shootings. Trial Tr. 1473.

{¶ 21} Detective Steele further testified that he located an FN brand magazine with numerous rounds on the dining room table. These rounds had a plastic blue tip and were a "special" caliber, not .40 caliber. Trial Tr. 1412; *see* State's Ex. 74. He indicated that, "if they were on a .40 and red," the plastic tips would have the same look as the red tips found by the coroner's office. *Id.*

{¶ 22} We find no arguable claim that appellate counsel rendered ineffective assistance in failing to claim that Detective Steele's testimony was false and misleading. Detective Steele was clear that he located two magazines in Smith's residence. Trial Tr. 1486. Although he found .40 S&W caliber rounds in the Glock magazine, he did not indicate that they had red tips and he stated that they could not be matched to the bullets used during the shooting. He also clearly stated that the bullets found in the other magazine had blue tips and were not .40 caliber. Contrary to Smith's assertion, Detective Steele did not testify about any .40 caliber red tip bullets found inside Smith's home.

B. Date of Haynes's Photo Spread Identification

{¶ 23} Second, Smith contends that the State knowingly presented false information to the jury when it introduced a photo spread with a falsified date. He claims that the photo spread shown to Dondray Haynes represented that it was shown and signed on December 5, 2019 (the day of the shootings), but Haynes testified that he did see or sign the photo spread on that date.

{¶ 24} Haynes worked as a security guard at the jazz club on the night of the shooting. At trial, Detective Thomas Cope and Zachary Williams testified that they went to Haynes's home on December 5, 2019, so that Detective Williams (the blind administrator) could present a photo spread to him. *See* Trial Tr. 1079, 1082, 1111-1112, 1115-1117, 1164-1167, 1285. They further indicated that, earlier that day, they had visited William Earnest at the hospital and obtained an identification from him. After speaking with Haynes, they went to Dwanaesha Nicholson's residence and asked her to look at a photo spread.

{¶ 25} During his testimony, Haynes acknowledged that he had been shown a photo spread, but he had difficulty remembering the details of when and how it was presented. He initially thought he "did one downtown" but indicated that he was not certain. He said, "I'm trying to remember, but it's been so long ago." Trial Tr. 688. On cross-examination, Haynes stated that he made the photo spread identification on the same day that he reviewed surveillance video. Trial Tr. 749-750. During recross-examination, Haynes agreed that Exhibit 57, the photo spread, was dated December 5, 2019, not several days later when Haynes went to the police station. Trial Tr. 776-777.

{¶ 26} Nothing in the record supports the idea that the State knowingly presented

false information via Exhibit 57. Detectives Cope and Williams testified to presenting photo spreads to three witnesses on December 5, 2019, and the date/time information on the three photo spreads supports that testimony. Earnest did not recall being shown the photo spread, but Nicholson testified that detectives came to her residence with one and she made a selection. Although Haynes recalled being shown a photo spread at the police station, he also testified that he had difficulty remembering the details of how it was presented. The evidence supports a reasonable conclusion that Haynes was mistaken about when he reviewed the photo spread, and there is nothing, other than conjecture, to support the conclusion that the date was falsified. Appellate counsel did not act deficiently in failing to claim that the State knowingly presented false evidence about Haynes's photo spread identification.

C. Statements of William McIntosh

{¶ 27} Third, Smith argues that William McIntosh provided false information to law enforcement. Smith claims that the State used McIntosh's information to secure warrants, generate photo spreads, and fabricate a timeline of events, all of which violated his right to due process.

{¶ 28} According to Detective Steele's search warrant affidavit, Steele had spoken with FBI Special Agent Buzzard, who said that an informant had contacted him with information about the food market homicide. The informant told Buzzard that another person, William McIntosh, had witnessed the shooting and told the informant that Smith, also known as "Pooter," was the shooter. McIntosh had also witnessed Smith ultimately leave the area in a black Chrysler 300 after the shooting. *See Smith*, 2d Dist. Montgomery No. 29597, 2023-Ohio-4565, at ¶ 60.

{¶ 29} McIntosh did not testify at trial. Although he was the source of Smith's name as the possible perpetrator, the State did not rely on his information at trial. Rather, the State's case was built on physical evidence and testimony from other witnesses, which showed that Smith was the shooter at both the jazz club and the food market. Smith's defense counsel thoroughly cross-examined the witnesses at trial and was able to test the credibility and reliability of the witnesses and other evidence. Smith's due process rights were not violated by law enforcement officers' use of McIntosh's statements in conducting the investigation and the State's use of the resulting evidence at trial. We find no arguable claim that appellate counsel acted deficiently regarding McIntosh's information to law enforcement.

VI. Trial Court's Failure to Correct False Information

{¶ 30} In his sixth proposed assignment of error, Smith claims that the trial court erred in failing to order the State to correct knowingly misleading testimony. He states that the trial court should have granted his July 29, 2022 motion to compel the State to inform the jury that Haynes gave incorrect testimony.

{¶ 31} The evidence at trial established that Smith fired multiple shots at Harris and Earnest as they stood near the entrance to the jazz club. Harris and Earnest both fell as other people in the entrance area scrambled away over crowd-control barriers. Haynes, who had been hit with pepper spray shortly before the shooting, pulled out his handgun and fired a shot toward Smith. Smith ran away down the alley toward his vehicle. Haynes identified Smith as being at the jazz club on the night of the shooting. He did not promptly inform the officers that he had fired a weapon, but he admitted that he had when later questioned about it.

{¶ 32} On cross-examination, defense counsel questioned Haynes about the lawfulness of his actions with his own gun, among other things. Haynes stated that he had not had a gun permit when the shooting occurred. Trial Tr. 706. He explained that he had let it lapse, which was why he was staying outside the bar. However, Haynes testified that his having a gun without a permit was not a violation of Ohio law because he was not a felon. *Id.* at 706-707. He did believe that he committed a crime when he fired his weapon. *See* Trial Tr. 711.

{¶ 33} In his motion to compel, Smith asked the trial court to require the State to inform the jury that Haynes provided false testimony when he said that, in 2019, it was not against the law to possess a pistol on one's person without a permit. Smith asserted that the correction was needed due to the prejudicial nature of Haynes's testimony. The trial court did not grant the motion.

{¶ 34} Upon review of the trial transcript, we find no genuine issue of ineffective assistance of counsel based on appellate counsel's failure to challenge the trial court's denial of the motion to compel. Whether Haynes acted lawfully when he possessed a firearm at the jazz club and then fired it were tangential issues. To the extent that they had any bearing on Haynes's credibility, defense counsel questioned both Haynes and Detective Steele about the legality of Haynes's actions. Considering the entirety of the evidence at trial, we find no basis to conclude that Smith was prejudiced by the trial court's denial of his motion to compel. Appellate counsel acted reasonably in failing to raise the issue on appeal.

VII. Failure to Exclude Video Under Evid.R. 403

{¶ 35} Smith's fifth proposed assignment of error asserts that the trial court violated

Evid.R. 403 and denied him a fair trial when it permitted the State to play the video recording of Nicholson's statement to the police at the food market (State's Exhibit 48). The State's response asserts that Smith's proposed claim is directed at the surveillance video from outside the jazz club, but the trial transcript pages cited by Smith (Trial Tr. 594, 603-606) fall within Nicholson's direct examination and refer to her recorded statement.

{¶ 36} "A trial court has broad discretion to admit or exclude evidence, and its exercise of that discretion will not be disturbed on appeal absent an abuse of discretion." *State v. Hunt*, 2d Dist. Darke No. 2018-CA-9, 2019-Ohio-2352, ¶ 27. When engaging in this gatekeeper capacity, the trial court must determine if potential evidence is relevant. *State v. Sutherland*, 2021-Ohio-2433, 173 N.E.3d 942, ¶ 24 (2d Dist.).

{¶ 37} A trial court may exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. Evid.R. 403. "Exclusion on the basis of unfair prejudice involves more than a balance of mere prejudice. If unfair prejudice simply meant prejudice, anything adverse to the litigant's case would be excludable under Rule 403. Emphasis must be placed on the word 'unfair.' Unfair prejudice is that quality of evidence which might result in an improper basis for a jury decision." *Oberlin v. Akron Gen. Med. Ctr.*, 91 Ohio St.3d 169, 172, 743 N.E.2d 890 (2001); *State v. Hatfield*, 2d Dist. Montgomery No. 28990, 2022-Ohio-148, ¶ 89. If the evidence arouses the emotions or sympathies of the jury, evokes a sense of horror, or appeals to an instinct to punish, the evidence is likely unfairly prejudicial and should be excluded. *Id.*

{¶ 38} State's Exhibit 48 shows Nicholson sitting in the open door of a police cruiser, talking to an officer about the food mart shooting shortly after the incident

occurred. Brown, the victim, was Nicholson's cousin, and Nicholson was distraught during her conversation with the police officer. The State offered the recording as an excited utterance, and the jurors thus heard Nicholson's distress when the recording was played. However, Nicholson told the officer what she observed and heard during the shooting, she provided a description of shooter, and she indicated the direction that shooter went. Thus, Nicholson's statements were highly probative of what occurred at the food market. Although the recording could have aroused some sympathy for Nicholson, we find no genuine issue that Smith was deprived of the effective assistance of counsel when appellate counsel failed to claim that the State's Exhibit 48 should have been excluded under Evid.R. 403.

VII. Firearm Examiner

{¶ 39} In his eighth proposed assignment of error, Smith states that the trial court erred "by not entering a mistrial when it permitted the State to prejudice the Defendant by allowing a gun examiner to testify as an expert where he was not certified or qualified as an expert violating the Defendant's right to trial and rights under due process."

{¶ 40} The admission of expert testimony is governed by Evid.R. 702, which provides:

> A witness may testify as an expert if all of the following apply:
>
> (A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;
>
> (B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the

testimony;

(C) The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:

(1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;

(2) The design of the procedure, test, or experiment reliably implements the theory;

(3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result.

"Whether a witness is qualified to testify as an expert is a matter for the court to determine pursuant to Evid.R.104(A)." *Perrucci v. Whittington*, 2018-Ohio-2968, 118 N.E.3d 311, ¶ 123, quoting *Schutte v. Mooney*, 165 Ohio App.3d 56, 2006-Ohio-44, 844 N.E.2d 899, ¶ 26 (2d Dist.).

{¶ 41} Robert Burns, a firearm examiner at the Miami Valley Regional Crime Lab (MVRCL), testified about the spent bullets and cartridge casings collected in this case. At the beginning of his testimony, he described the training he took to become a firearms examiner, his prior firearm examiner experience, the continuing training that he had completed, and the skills he needed to demonstrate upon being hired by MVRCL. Trial Tr. 1530-1532. Burns testified that he was considered a qualified firearms examiner at MVRCL in December 2019 and January 2020. Trial Tr. 1532.

{¶ 42} The State did not ask the trial court to recognize Burns as an expert before asking him questions about firearms and ammunition. However, Smith did not object to the State's failure to do so, nor did he object to the trial court's failure to expressly determine whether Burns qualified as an expert. Consequently, Smith waived all but plain error with respect to Burns's ability to testify as an expert. *See State v. Hayes*, 2d Dist. Montgomery No. 26379, 2016-Ohio-7241, ¶ 116. On this record, Smith has not shown that his appellate counsel acted deficiently when he failed to challenge the admissibility of Burns's expert testimony or the trial court's failure to declare a mistrial (which was not requested on this basis) due to Burns's testifying as an expert.

VIII. Sex Offender Classification

{¶ 43} Smith's seventh proposed assignment of error claims that "the trial court violated [his] constitutional due process rights when it classified him as a sex offender where his case contained no sexual related crimes." Smith points to the description on the trial court's docket for an August 31, 2022 entry, which states: "Entry Finding Defendant a Sexual Offender; Tier."

{¶ 44} It is clear from the record that the court's docket misidentifies the August 31, 2022 document. Smith was found to be a violent offender, and the document filed on August 31, 2022 was the Notice of Duties to Enroll as a Violent Offender, which Smith and the trial court had signed. Moreover, the sentencing hearing transcript substantiates that the trial court told him that he was required to enroll as a violent offender and informed him of those requirements. Trial Tr. 2163-2165. Smith was not designated a sex offender. Accordingly, appellate counsel did not render ineffective assistance by failing to claim that Smith was improperly designated a sex offender.

IX. Prosecutorial Misconduct

{¶ 45} Smith's ninth proposed assignment of error claims that the prosecutor engaged in misconduct during rebuttal closing argument by vouching for the credibility of witnesses. Trial Tr. 2084-2085, 2090-2092. He also challenges the following comment: "Ms. Jackson says, he [Smith] kind of looked like his eyes were red, like he had an allergies, or he's crying or been up all night. That's what she noticed. That's what caught her attention. Maybe *walking around all night, thinking I just shot my cousin* * * *." (Emphasis added.)

{¶ 46} In his direct appeal, Smith raised several alleged instances of prosecutorial misconduct during the State's rebuttal closing argument. As we stated there, "In general, prosecutors enjoy a wide degree of latitude during closing arguments. They may freely address what the evidence has shown and what reasonable inferences may be drawn from that evidence." (Citations omitted.) *Smith*, 2d Dist. Montgomery No. 29597, 2023-Ohio-4565, at ¶ 125.

{¶ 47} Again, we review allegations of prosecutorial misconduct in the context of the entire trial. *State v. Stevenson*, 2d Dist. Greene No. 2007-CA-51, 2008-Ohio-2900, ¶ 42, citing *Darden v. Wainwright*, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). "Where it is clear beyond a reasonable doubt that the trier of fact would have found the defendant guilty, even absent the alleged misconduct, the defendant has not been prejudiced, and his [or her] conviction will not be reversed." *State v. St. John*, 2d Dist. Montgomery No. 27988, 2019-Ohio-650, ¶ 110.

{¶ 48} Upon review of the portions of the State's rebuttal closing argument cited by Smith in his application, the prosecutor's arguments did not amount to prosecutorial

misconduct. Appellate counsel did not render ineffective assistance by failing to contest these additional sections of the State's rebuttal argument.

X. Jury Instruction on Reasonable Doubt

{¶ 49} Smith's tenth proposed assignment of error claims that the trial court incorrectly instructed the jury on the State's burden of proof at trial. He argues that the court's instruction made it appear that the jury could find him guilty on less than "beyond a reasonable doubt."

{¶ 50} The trial court provided the following instruction on the State's burden of proof:

> The Defendant is presumed innocent until his guilt is established beyond a reasonable doubt. The Defendant must be acquitted unless the State produces evidence which convinces you beyond a reasonable doubt of every essential element of the offenses charged in the indictment.
>
> Reasonable doubt is present when the jurors, after they have carefully considered and compared all of the evidence, cannot say that they are firmly convinced of the truth of the charge. It is a doubt based on reason and commonsense. Reasonable doubt is not mere possible doubt because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. Proof beyond a reasonable doubt is proof of such a character that an ordinary person would be willing to rely and act upon it in the most important of his or her own affairs.

Trial Tr. 2100-2101.

{¶ 51} Smith did not object to the trial court's jury instruction on reasonable doubt.

Moreover, we find nothing incorrect or misleading about the given instruction. The terms "reasonable doubt" and "proof beyond a reasonable doubt" are defined in R.C. 2901.05(E), and the trial court's instruction tracked the statutory language. Appellate counsel did not act deficiently in failing to challenge the trial court's instruction on "reasonable doubt" on appeal.

XI. Cumulative Error

{¶ 52} Finally, in his third proposed assignment of error, Smith argues that his appellate counsel should have raised cumulative error. He points to the following alleged errors: (1) lack of effective cross-examination of Haynes by defense counsel; (2) the trial court's permitting the State to ask leading questions; (3) the State's failure to authenticate the surveillance videos from the jazz club; (4) the admission of coroner photos that were more prejudicial than probative; (5) the prosecutor's misstating the name of a witness shown in a jazz club video; (6) Haynes and Earnest testified about facts shown on the jazz club surveillance video based on their viewing the video, not their recollections; (7) the trial court permitted hearsay testimony by Officer Craig Stiver, an evidence technician; (8) Detective Steele participated in addressing a disruption in the courtroom; and (9) the admission of evidence regarding the offense of having weapons while under disability.

{¶ 53} Under the cumulative error doctrine, "a conviction will be reversed when the cumulative effect of errors in a trial deprives a defendant of a fair trial[,] even though each of the numerous instances of trial-court error does not individually constitute cause for reversal." *State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶ 223, citing *State v. DeMarco*, 31 Ohio St.3d 191, 196-197, 509 N.E.2d 1256 (1987). "However, in order even to consider whether 'cumulative' error is present, we would first have to find

that multiple errors were committed." *State v. Madrigal*, 87 Ohio St.3d 378, 398, 721 N.E.2d 52 (2000); *State v. Mize*, 2022-Ohio-3163, 195 N.E.3d 574, ¶ 76 (2d Dist.). "We then must find a reasonable probability that the outcome of the trial would have been different but for the combination of the separately harmless errors." *Mize* at ¶ 76, quoting *State v. Durant*, 159 Ohio App.3d 208, 2004-Ohio-6224, 823 N.E.2d 506, ¶ 38 (2d Dist.).

{¶ 54} We disagree with Smith's contention that numerous errors occurred at trial. Upon review of the record, we do not find any errors, individually or cumulatively, that deprived him of a fair trial. Appellate counsel reasonably failed to raise an assignment of error based on cumulative error.

XII. Conclusion

{¶ 55} Smith's application for reopening is DENIED.

SO ORDERED.

Christopher B. Epley

CHRISTOPHER B. EPLEY, PRESIDING JUDGE

JEFFREY M. WELBAUM, JUDGE

Mary K. Huffman

MARY K. HUFFMAN, JUDGE

Appendix B

The Supreme Court of Ohio

State of Ohio

v.

Christopher L. Smith

Case No. 2024-0859

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the court declines to accept jurisdiction of the appeal pursuant to S.Ct.Prac.R. 7.08(B)(4).

(Montgomery County Court of Appeals; No. 29597)

Sharon L. Kennedy
Chief Justice

THE FIFTH AMENDMENT: CRIMINAL ACTIONS; PROVISIONS CONCERNING DUE PROCESS OF LAW AND JUST COMPENSATION CLAUSES:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Appendix D

THE SIXTH AMENDMENT: RIGHTS OF THE ACCUSED:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Appendix E

THE FOURTEENTH AMENDMENT: DUE PROCESS AND EQUAL PROTECTION UNDER THE LAW:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.