

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

MARQUEZ DUANE COE

Defendant-Appellee

JUDGES:

Hon. Julie A. Edwards, P.J.

Hon. Sheila G. Farmer, J.

Hon. John W. Wise, J.

Case No. 2009 CA 00050

OPINION

CHARACTER OF PROCEEDING:

Criminal Appeal from the Court of Common
Pleas, Case No. 2008 CR 01843

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

April 26, 2010

APPEARANCES:

For Plaintiff-Appellee

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Wise, J.

{¶1} Defendant-Appellant Marquez Duane Coe appeals his conviction and sentence entered by the Stark County Court of Common Pleas Court, following a jury trial.

{¶2} Plaintiff-Appellee is the State of Ohio.

STATEMENT OF THE CASE AND FACTS

{¶3} On October 1, 2008, Florence Richards was at home at her residence on Second St. N.E., Canton with Eldin Bissett and her nephew, Richard Howard, when three people pushed the door open, entered the residence and demanded money at gun point. (T. at 135-139). Richards fell on the couch screaming, calling for her nephew, who was upstairs in his room. The person who pointed the gun at Richards had his face covered. (T. at 140). Two of the men stood at the door while the third man went into the kitchen. (T. at 142). The second man was wearing a mask and also had a gun. (T. at 140, 158).

{¶4} One of the gunman, later identified as Appellant Marquez Coe, hit Richards in the chest with the gun. (T. at 143, 172). Bissett, Richards' long time friend who had been sleeping in a reclining chair in the living room, protested when he saw this because Richards had recently had heart surgery. (T. at 143, 144). The robber then hit Bissett three times about his head with his gun, causing severe bleeding and requiring stitches. *Id.* The robber then delivered another blow with the gun to Richards' hand leaving a large contusion. *Id.* Richards' nephew, Howard, came running downstairs and told the robbers that there was no money in the house. The gunman hit him in the chin and chest with the gun. (T. at

141, 143, 161, 182). Howard recognized one of the robbers as Matt Smith, aka “Shoody”, from a group home where they had both lived. (T. at 176).

{¶15} Having failed to find the money they were looking for in Richard’s house, the gunman demanded that Five Hundred Dollars (\$500.00) be delivered to CHIPS apartments. (T. at 145, 160, 183).

{¶16} The case was assigned to the Canton Gang Task Force. Detective Jerry Fuelling, who led the investigation and interviewed the victims/witnesses. Upon being shown a photo array, neither Richards, Bissett nor Howard could identify Appellant Coe as being one of the perpetrators. In fact, Howard told the Detective that he knew Coe and he did not believe he was one of the intruders.

{¶17} Matthew Smith, however, was identified and arrested the next day at school. Smith immediately admitted his involvement to Detective Jerry Fuelling and named Trevhon Spencer and Marquez Coe as the other two people involved in the incident at Richards' home on October 1st.

{¶18} Smith told Det. Fuelling that he and Trevhon Spencer agreed to go with Appellant Coe to get some money owed to him by someone named Ed. (T. at 369). Failing to find Ed at the first place they looked, they then proceeded to Ed’s mother Florence Richards’ house. (T. at 373).

{¶19} Det. Fuelling then went to Hartford Middle School where, with the principal present, Trevhon Spencer admitted his involvement with the aggravated robberies of Richards, Bissett and Howard. Like Smith, Spencer testified that they went with Appellant to try to find someone named Ed who owed Appellant money, that Ed was not at the first place they went and that they then went to his mother’s

house to look for him. (T. at 291-301).

{¶10} At trial, Spencer testified that he hung out with members of the Rated R Gang, but was not a validated member yet because he had not yet agreed to be "jumped", or beaten up, as part of the initiation.

{¶11} Det. Fuelling next spoke with Appellant Coe, who told him that he was not involved in the incident at Richards' house saying that he was "[a]t home waiting for my check to come, sir and, with my baby mom."

{¶12} Appellant did admit that he was a member of the South Side Gang. He further admitted that neither Smith nor Spencer knew where Ed's mother, Florence Richards, lived.

{¶13} Appellant Marquez Duane Coe was indicted by the Stark County Grand Jury on three counts of aggravated robbery, violations of R.C. §2911.01(A)(1) [F1], one count of aggravated burglary, a violation of R.C. §2911.11(A)(1) and/or (A)(2) [F1], three counts of felonious assault, violations of R.C. §2903.11 [F2], three counts of kidnapping, violations of R.C. §2905.01(B)(2) [F1], one count of participating in a criminal gang, a violation of R.C. §2923.42(A) [F2] and one count of having weapons while under disability, a violation of R.C. §2923.13(A)(2) and/or (A)(3) [F3]. Several of the counts contained firearms specification and gang specifications.

{¶14} Appellant pled not guilty and on January 5, 2009, the case proceeded to a jury trial.

{¶15} At trial, the State produced nine witnesses, including the three victims, who testified to the events as set forth above. The State also produced several exhibits

at trial, including photographs from Appellant's "MySpace" page, in which Appellant was shown "throwing" various gang signs and identifying himself as a member of the South Side Gangsters.

{¶16} When the State rested its case, Appellant's made a Crim.R. 29 motion for acquittal. The trial court granted Appellant's motion as to the charges of kidnapping but overruled it as to the remainder of the counts in the indictment.

{¶17} Appellant presented no witnesses in his defense, thereby abandoning his "alibi" defense.

{¶18} The trial court instructed the jury on issues relating to the charges in the indictment, instructing the jury that the evidence of prior convictions was to be considered only for the limited purpose of establishing the elements of the crimes of participating in a criminal gang and having weapons under disability.

{¶19} After hearing the evidence and receiving instructions from the trial court, the jury began their deliberations and returned with a verdict of guilty to all remaining charges in the indictment.

{¶20} The trial court then proceeded to sentencing, merging the gang specifications with the crime of participation in a criminal gang, reaching a total cumulative sentence of fifteen years.

{¶21} It is from this conviction and sentence Appellant appeals, raising the following assignments of error:

ASSIGNMENTS OF ERROR

{¶22} "I. THE TRIAL COURT'S FINDING OF GUILT IS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE.

{¶23} “II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ALLOWING THE STATE TO INTRODUCE INADMISSIBLE HEARSAY EVIDENCE.

{¶24} “III. THE APPELLANT WAS DEPRIVED OF DUE PROCESS BY THE MISCONDUCT OF THE PROSECUTOR.

{¶25} “IV. THE TRIAL COURT COMMITTED ERROR BY IMPROPERLY CHARGING THE JURY.

{¶26} “V. THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING A TAPE RECORDING NOT SUBMITTED INTO EVIDENCE BY THE STATE TO BE PLAYED FOR THE JURY DURING DELIBERATIONS.

{¶27} “VI. THE APPELLANT’S CONVICTION IS CONTRARY TO THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMMENDMENT OF THE UNITED STATES CONSTITUTION.”

I.

{¶28} In his first assignment of error, Appellant challenges his conviction as against the sufficiency and manifest weight of the evidence. We disagree.

{¶29} Our standard of reviewing a claim a verdict was not supported by sufficient evidence is to examine the evidence presented at trial to determine whether the evidence, if believed, would convince the average mind of the accused’s guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt, *State v. Jenks* (1991), 61 Ohio St. 3d 259.

{¶30} The Supreme Court has explained the distinction between claims of sufficiency of the evidence and manifest weight. Sufficiency of the evidence is a question for the trial court to determine whether the State has met its burden to produce evidence on each element of the crime charged, sufficient for the matter to be submitted to the jury.

{¶31} Manifest weight of the evidence claims concern the amount of evidence offered in support of one side of the case, and is a jury question. We must determine whether the jury, in interpreting the facts, so lost its way that its verdict results in a manifest miscarriage of justice, *State v. Thompkins* (1997), 78 Ohio St. 3d 387, citations deleted. On review for manifest weight, a reviewing court is “to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses and determine whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed. The discretionary power to grant a new hearing should be exercised only in the exceptional case in which the evidence weighs heavily against the judgment.” *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Because the trier of fact is in a better position to observe the witnesses’ demeanor and weigh their credibility, the weight of the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, syllabus 1.

{¶32} In *State v. Thompkins* (1997), 78 Ohio St.3d 380, the Ohio Supreme Court held “[t]o reverse a judgment of a trial court on the basis that the judgment is not sustained by sufficient evidence, only a concurring majority of a panel of a court of

appeals reviewing the judgment is necessary." *Id.* at paragraph three of the syllabus. However, to "reverse a judgment of a trial court on the weight of the evidence, when the judgment results from a trial by jury, a unanimous concurrence of all three judges on the court of appeals panel reviewing the case is required." *Id.* at paragraph four of the syllabus; *State v. Miller* (2002), 96 Ohio St.3d 384, 2002-Ohio-4931 at ¶38, 775 N.E.2d 498.

{¶33} Appellant asserts that the State of Ohio failed to prove identification as to the charges of aggravated robbery, burglary, felonious assault and having a weapon under disability.

{¶34} Upon review, we find that there is sufficient evidence as to the element of identification as both Matt Smith and Trevhon Spencer identified Appellant as the masked assailant involved in the incident which occurred at Florence Richards house and further identified him as the gunman who struck the Richards, Bissett and Howard with his gun. (T. at , 300-305, 374-386). Both testified that they went with Appellant to find "Ed" because he owed Appellant money. (293, 369-371).

{¶35} Additionally, both Matt Smith and Trevhon Spencer describe what they and Appellant were all wearing when they went to Florence Richards' house, and their descriptions match the descriptions given by Florence Richards, Eldin Bissett and Richard Howard. (T. at 137, 158, 179-181, 183, 291-293, 303, 377-381).

{¶36} Appellant argues that Trevhon Spencer and Matt Smith had in incentive to lie in this case. As stated above, the trier of fact is in a far better position to observe the witnesses' demeanor and weigh their credibility. *State v. DeHass* (1967), 10 Ohio St.2d 230.

{¶37} Appellant herein also challenges his conviction for participation in a gang, in violation of R.C. §2923.42(A), which provides in relevant part:

{¶38} “(A) No person who actively participates in a criminal gang, with knowledge that the criminal gang engages in or has engaged in a pattern of criminal gang activity, shall purposely promote, further, or assist any criminal conduct, as defined in division (C) of section 2923.41 of the Revised Code, or shall purposely commit or engage in any act that constitutes criminal conduct, as defined in division (C) of section 2923.41 of the Revised Code.”

{¶39} R.C. §2923.41(C) defines “criminal conduct” as:

{¶40} “[T]he commission of, an attempt to commit, a conspiracy to commit, complicity in the commission of, or solicitation, coercion, or intimidation of another to commit, attempt to commit, conspire to commit, or be in complicity in the commission of an offense listed in [R.C. 2923.41(B)(1)(a), (b), or (c)] or an act that is committed by a juvenile and that would be an offense, an attempt to commit an offense, a conspiracy to commit an offense, complicity in the commission of, or solicitation, coercion, or intimidation of another to commit, attempt to commit, conspire to commit, or be in complicity in the commission of an offense listed in [R.C. 2923.41(B)(1)(a), (b), or (c)] if committed by an adult.”

{¶41} R.C. §2923.41(A) defines “criminal gang” as an “ongoing formal or informal organization, association, or group of three or more persons to which all of the following apply:

{¶42} “(1) It has as one of its primary activities the commission of one or more of the offenses listed in division (B) of this section.

{¶43} “(2) It has a common name or one or more common, identifying signs, symbols, or colors.

{¶44} “(3) The persons in the organization, association, or group individually or collectively engage in or have engaged in a pattern of criminal gang activity.”

{¶45} Pursuant to R.C. §2923.41(B)(1), “ ‘Pattern of criminal gang activity’ means, subject to division (B)(2) of this section, that persons in the criminal gang have committed, attempted to commit, conspired to commit, been complicitors in the commission of, or solicited, coerced, or intimidated another to commit, attempt to commit, conspire to commit, or be in complicity in the commission of two or more of any of the following offenses:

{¶46} “(a) A felony or an act committed by a juvenile that would be a felony if committed by an adult;

{¶47} “(b) An offense of violence or an act committed by a juvenile that would be an offense of violence if committed by an adult;

{¶48} “(c) A violation of section 2907.04, 2909.06, 2911.211, 2917.04, 2919.23, or 2919.24 of the Revised Code, section 2921.04 or 2923.16 of the Revised Code, section 2925.03 of the Revised Code if the offense is trafficking in marihuana, or section 2927.12 of the Revised Code.”

{¶49} Further, R.C. §2923.41(B)(2) provides:

{¶50} “There is a ‘pattern of criminal gang activity’ if all of the following apply with respect to the offenses that are listed in division R.C. 2923.41(B)(1)(a), (b), or (c) and that persons in the criminal gang committed, attempted to commit, conspired to

commit, were in complicity in committing, or solicited, coerced, or intimidated another to commit, attempt to commit, conspire to commit, or be in complicity in committing:

{¶51} “(a) At least one of the two or more offenses is a felony.

{¶52} “(b) At least one of those two or more offenses occurs on or after the effective date of this section.

{¶53} “(c) The last of those two or more offenses occurs within five years after at least one of those offenses.

{¶54} “(d) The two or more offenses are committed on separate occasions or by two or more persons.”

{¶55} In *State v. Stallings*, 150 Ohio App.3d 5, 2002-Ohio-5942, the Ninth District Court of Appeals held that “[a]s applied to R.C. 2923.42(A), the common and ordinary meaning of ‘actively participates in a criminal gang’ is involvement with a criminal gang that is more than nominal or passive.” In *Stallings*, the Ninth District further found that “for a defendant to be criminally liable under R.C. 2923.42(A), he would also have to be criminally liable as an aider or abettor to a crime committed by a fellow gang member or members.” *Stallings*, 150 Ohio App.3d at 12, see also *State v. Stewart*, Third District, Case No. 13-08-18, 2009-Ohio-3411.

{¶56} At trial, during Det. Fuelling’s testimony, the State played the taped recording of the interview wherein Appellant admitted to him that he was a member of South Side Gangsters. (State’s Ex. 8). Trevhon Spencer testified that Appellant told him he belonged to the South Side Gangsters, (T. at 315). Spencer further testified that he was a member of the Taliban gang, which included members from South Side,

Crypt and Rated R. (T. at 318). Spencer also testified that Matt Smith was a member of the Rated R gang. (T. at 315).

{¶157} The jury also heard testimony from Steven Humphrey, a juvenile probation officer assigned to monitor gang member juveniles. Humphrey testified as to the different gangs in the Stark County area, and identified the Rated R, a Crypt sect, and the Unit, a Blood sect, as the two most popular gangs in the area. Humphrey also testified that the Rated R gang and South Side Gangsters would join together as a gang known as the Taliban, for purposes of opposing a common rival, the Unit.

{¶158} At trial, Humphrey viewed the photographs Appellant had posted to his MySpace page and identified Appellant as throwing signs attributed to the South Side Gangsters, the Taliban and the AI Block, a subset of the South Side. (T. at 459).

{¶159} Humphrey also identified other gang members that were Appellant's associates including Spencer, Jerod "Booby" Thomas, Jamar "Marmar" Babb and Matt Smith. Humphrey identified photographs of Appellant with other gang members including Thomas and Babb. Trevhon Spencer also testified that he communicated with Appellant on Appellant's MySpace page. (T. at 325-330).

{¶160} Moreover, the jury heard the testimony of Jeffrey Weller, a Canton policeman assigned to the Gang Task Force. Officer Weller testified extensively about gang identification. He stated that gangs are a group of more than three persons who involve themselves in criminal activity to promote their gang activities including selling drugs, robberies, burglaries, weapons and intimidation of people. (T. at 459). He testified as to his knowledge of the South Side Gangsters, the Unit and Rated R. He

stated that the South Side Gangsters consisted of approximately twenty (20) members and that some of its members had identifying tattoos but that others did not. (T. at 412-413). Officer Weller also testified that in addition identifying tattoos, members of certain gangs generally wore certain colors and that the South Side Gangsters normally wore blue, but sometimes also dressed in black or white. (T. at 424).

{¶61} He further testified that these gangs served no official purpose and did not engage in any positive, social programs. (T. at 425). Specifically, he stated that the primary purpose of the South Side Gangsters was distribution of drugs and that they also engaged in robberies, burglaries and assault in support of the drug trade. (T. at 425).

{¶62} Officer Weller stated that he had personally investigated four of South Side's gang members for criminal activity: Cruz Brown, Marvin Brunner, Jerod "Booby" Thomas and Christen Clark. He further testified that several of those members were convicted of participation in a criminal gang.

{¶63} In addition to the above testimony, the jury also heard tapes of Appellant's telephone calls made while he was in jail. (State's Ex. 9). Detective Fuelling identified the tapes and testified to their contents including conversations Appellant had about gang activity and his MySpace page. (T. at 256).

{¶64} Although not charged with trafficking marijuana, Appellant admitted that he sold marijuana for "Ed". Evidence was also presented as to Appellant's previous convictions for robbery, receiving stolen property and possession of marijuana.

{¶65} Based on the foregoing, we do not find that the jury lost its way or that there was otherwise insufficient evidence to establish that Appellant was a member of

a criminal gang and was participating in criminal conduct with that gang, as the testimony at trial clearly indicated Appellant was engaged in the business of committing aggravated robbery, aggravated burglary, and selling drugs with other gang members.

{¶66} Based upon the foregoing and the entire record in this matter, we find Appellant's conviction was neither against the manifest weight nor the sufficiency of the evidence.

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

II.

{¶68} In his second assignment of error, Appellant contends that it was error for the trial court to allow evidence taken from his MySpace page. We disagree.

{¶69} Specifically, Appellant argues that certain text messages from the MySpace were introduced and that such constituted inadmissible hearsay.

{¶70} Initially, we note that the admission or exclusion of evidence lies in the trial court's sound discretion. *State v. Sage* (1987), 31 Ohio St.3d 173. In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

{¶71} Upon review, we find that the trial limited introduction of evidence from Appellant's MySpace page to only of photographs and text posted by Appellant himself. The trial court did not allow the State to present or the jury to view any posting made by third parties to Appellant's MySpace page. As such, we do not find that the trial court allowed the State to introduce any inadmissible hearsay.

{¶72} Based on the foregoing, we find Appellant's second assignment of error not well-taken and hereby overrule same.

III.

{¶73} In his third assignment of error, Appellant contends that the State committed prosecutorial misconduct, thereby depriving him of due process. We disagree.

{¶74} Specifically, Appellant argues that the prosecutors vouched for the credibility of witnesses, repeatedly attempted to garner sympathy for the victims by making references to the age of the victims, the fact that Florence Richards had a heart condition and that Richard Howard had had a tough life. Additionally, Appellant argues that the prosecutor chose to introduce photographs which sensationalized the injuries of the victims.

{¶75} Upon review, we find that Appellant failed to object to these alleged instances of misconduct. Therefore, he has waived all but plain error. See Crim.R. 52(B). An alleged error is plain error only if the error is "obvious," *State v. Barnes* (2002), 94 Ohio St.3d 21, 27, and "but for the error, the outcome of the trial clearly would have been otherwise." *State v. Long* (1978), 53 Ohio St.2d 91, paragraph two of the syllabus; *State v. Perez*, 124 Ohio St.3d 122, 148. A court recognizes plain error with the utmost caution, under exceptional circumstances, and only to prevent a miscarriage of justice. *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266. We may reverse only when the record is clear that defendant would not have been convicted in the absence of the improper conduct. *State v. Williams* (1997), 79 Ohio St.3d 1, 12, 679 N.E.2d 646.

{¶76} In order to determine whether a prosecutor's remarks constitute misconduct, a court must consider the following: "(1) whether the remarks were improper; and, if so, (2) whether the remarks prejudicially affected a defendant's substantial rights. * * * To demonstrate prejudice, a defendant must show that the improper remarks or questions were so prejudicial that the outcome of the trial would clearly have been otherwise had they not occurred." *State v. Jones*, Butler App. No. CA2006-11-298, 2008-Ohio-865, ¶ 21. (Citations omitted.)

{¶77} In reviewing allegations of prosecutorial misconduct, it is the duty of this court to consider the complained of conduct in the context of the entire trial. *State v. Waters*, Butler App. No. CA2002-11-266, 2003-Ohio-5871, ¶ 23. The touchstone of the analysis is the fairness of the trial, not the culpability of the prosecutor. *State v. Lott* (1990), 51 Ohio St.3d 160, 166. The Ohio Supreme Court has held that prosecutorial misconduct is not ground for error unless the defendant has been denied a fair trial. *State v. Maurer* (1984), 15 Ohio St.3d 239, 266; *State v. Ghee*, Madison App. No. CA2008-08-017, 2009-Ohio-2630, ¶ 42.

{¶78} At the outset, we observe that the jury was instructed that the statements made by the parties during opening statements and closing arguments were not evidence. We must therefore presume that the jury followed the trial court's instructions.

{¶79} Initially, Appellant argues that the prosecutor committed misconduct by seeking to introduce photographs of the victims' injuries during opening statements. Upon review, we find that the trial court did not allow such photographs to be used during opening statements. We therefore can find no prejudice to Appellant.

{¶80} Appellant next argues that the prosecutor committed misconduct by attempting to garner sympathy for the victims by making reference to the ages of the victims and the fact that one of the victims had a heart condition.

{¶81} As it was the Appellant and not the prosecutor who chose these particular victims, we do not find that it is misconduct on the part of the prosecutor to comment on their ages and/or health conditions. Appellant can hardly be heard to complain that he is prejudiced by the fact that the victims he chose were more sympathetic due to their age or health.

{¶82} Additionally, Appellant argues that the prosecutor should not have elicited testimony about Richard Howard's life, including the fact that he had lived in a group home.

{¶83} Upon review, we find that this line of questioning was relevant to the State's case in that it was Howard who was able to identify one of the assailants because he recognized him from when the two of them both lived in the same group home.

{¶84} Appellant next argues that the prosecutor committed misconduct when he vouched for the veracity of the co-defendants in this case when he made the following statements during opening statements:

{¶85} "Prosecutor: The only time they were promised anything is, is when they went to plea, prosecutor's office, on behalf, we said to them, If you testify truthfully and cooperate in the investigation against the defendant, that your case will be kept in juvenile court. And that's exactly what they are going to come in here and do today." (T. at 127-128).

{¶186} Upon reviewing the record we find that the trial court sua sponte admonished the prosecutor, stating:

{¶187} “Court: Counsel, don’t vouch for the veracity of a witness.” (T. at 128).

{¶188} Further, we find no plain error in the assertion that the prosecution improperly bolstered the credibility of the co-defendants by mentioning that they had agreed to tell the truth as a part of their plea agreements. See *State v. Rogers* (1986), 28 Ohio St.3d 427, and *State v. Tyler* (1990), 50 Ohio St.3d 24, 41.

{¶189} Appellant also argues that the photographs selected by the prosecutor were designed to sensationalize the injuries of the victims rather than prove the elements of the State’s case.

{¶190} Under Evid.R. 403, the admission of photographs is left to the sound discretion of the trial court. *State v. Maurer* (1984), 15 Ohio St.3d 239, 264, cert. denied (1985), 472 U.S. 1012, 105 S.Ct. 2714. An abuse of discretion connotes an attitude by the court that is arbitrary, unconscionable, or unreasonable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217. We conclude that the photographs are both relevant and probative and that the trial court did not abuse its broad discretion in allowing them in evidence. It is to be expected that most photographs depicting injuries and/or blood will be “sensational” or gruesome by their very nature. For that reason, “the mere fact that a photograph is gruesome or horrendous is not sufficient to render it per se inadmissible.” *State v. Maurer* (1984), 15 Ohio St.3d 239, 264-65, 473 N.E.2d 768, citing *State v. Woodards* (1966), 6 Ohio St.2d 14, 25, 215 N.E.2d 568. “Non-repetitive photographs ..., even if gruesome, are admissible if the probative value of each photograph outweighs

the danger of material prejudice to the accused.” *State v. Jalowiec*, 91 Ohio St.3d 220, 229, 2001-Ohio-26.

{¶91} Again, we find that as it was Appellant who caused these injuries, he cannot argue that the jury should not be allowed to hear about or see pictures of those injuries he caused because they are too “sensational.” These photographs were evidence which depicted the actual injuries suffered by the victims in the case sub judice.

{¶92} In the context of the entire trial, we do not find that the above statements or introduction of photographs rise to the level of plain error.

{¶93} Appellant’s third assignment of error is overruled.

IV.

{¶94} In his fourth assignment of error, Appellant argues the trial court erred in improperly charging the jury on the offense of participating in a criminal gang. We disagree.

{¶95} Appellant assigns as error the inclusion of the crimes of kidnapping and possession of marijuana in the list of acts which constitute criminal conduct under R.C. §2923.41.

{¶96} Upon review, we find that Appellant failed to object.

{¶97} Based upon Appellant's failure to object to the instructions and bring the issue to the trial court's attention for consideration, we must address this assignment under the doctrine of plain error. *State v. Williford* (1990), 49 Ohio St.3d 247. In order to prevail under a plain error analysis, Appellant bears the burden of demonstrating that the outcome of the trial clearly would have been different but for the errors. *State v.*

Long (1978), 53 Ohio St.2d 91; Crim.R. 52(B). Notice of plain error “is taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.” *State v. Long*, 53 Ohio St.2d 91 at paragraph 3 of the syllabus. We will not reverse a conviction due to error in the jury instructions unless the error is so prejudicial that it may induce an erroneous verdict.

{¶198} Appellant argues that the inclusion of the kidnapping charge, which was dismissed by the trial court at the conclusion of the State’s case, led the jury to believe that Appellant had engaged in more criminal behavior and that this cast him in a negative light.

{¶199} In view of the evidence of Appellant’s guilt in this record, we cannot say that there exists a reasonable probability that Appellant would have been acquitted had the trial court provided the jury with an instruction that did not include the kidnapping and/or possession of marijuana charges. It follows that the trial court did not commit plain error.

{¶100} Appellant’s fourth assignment of error is overruled.

V.

{¶101} In his fifth assignment of error, Appellant argues that the trial court abused its discretion in allowing the jury to listen to a tape recording during deliberations which had not been submitted into evidence. We disagree.

{¶102} As stated above, decisions regarding the admissibility of evidence are within the sound discretion of the trial court and will not be reversed absent a showing of an abuse of discretion.” *State v. Sage* (1987), 31 Ohio St.3d 173. An abuse of discretion “connotes more than an error of law or judgment; it implies that the court's attitude is

unreasonable, arbitrary, or unconscionable.” *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶103} During deliberations, the jury asked to listen to certain recordings, including the telephone calls placed by Appellant while he was in jail, which had been presented during trial. Appellant argues that it was error for the trial court to allow the jury to hear this recording because the recording of the jail house conversations had never been separately admitted into evidence at the conclusion of the trial.

{¶104} Upon review, we find that such recording was introduced as evidence during the trial and that as such, allowing the jury to review such evidence again was not error.

{¶105} Appellant’s fifth assignment of error is overruled.

VI.

{¶106} In his sixth and final assignment of error, Appellant argues that his conviction for participating in a criminal gang is contrary to the double jeopardy clause. We disagree.

{¶107} In the instant case, the State provided evidence that Appellant had been previously adjudicated delinquent for robbery, receiving stolen property and possession of marijuana.

{¶108} Appellant argues that his conviction for participating in a criminal gang is based on the same conduct and that such violates the rule against multiple punishments for a single act or course of conduct.

{¶109} The federal and state constitutions’ double jeopardy protection guards citizens against cumulative punishments for the “same offense.” *State v. Moss* (1982),

69 Ohio St.2d 515, 518. Despite such constitutional protection, a state legislature may impose cumulative punishments for crimes that constitute the “same offense” without violating double jeopardy protections. *State v. Rance* (1999), 85 Ohio St.3d 632, 635, citing *Albernaz v. United States* (1981), 450 U.S. 333, 344, 101 S.Ct. 1137. Under the “cumulative punishment” prong, double jeopardy protections do “no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.” *Missouri v. Hunter* (1983), 459 U.S. 359, 366, 103 S.Ct. 673. When a legislature signals its intent to either prohibit or permit cumulative punishments for conduct that may qualify as two crimes, the legislature's expressed intent is dispositive. *Rance*, at 635. Therefore, when determining the constitutionality of imposing multiple punishments against a criminal defendant in one criminal proceeding for criminal activity emanating from one transaction, appellate courts are limited to assuring that the trial court did not exceed the sentencing authority the legislature granted to the judiciary. *Moss*, at 518, citing *Brown v. Ohio* (1977), 432 U.S. 161, 97 S.Ct. 2221.

{¶110} The constitutionality of Ohio's gang statute has been reviewed and upheld by Ohio courts. See *State v. Hairston*, Franklin App. 08 AP 735, 2009-Ohio-2346; *State v. Williams*, 148 Ohio App.3d 473, 2002-Ohio-3777.

{¶111} Upon review, we find that Appellant's conviction for participation in a criminal gang is divisible from the convictions for robbery, receiving stolen property and possession of marijuana.

{¶112} The gang statute criminalizes the objective to promote, further or assist the gang in felonious conduct. As such, it requires separate intent and objective than that necessary for the underlying crimes. The gang statute does not re-try a defendant

for previous convictions, it only requires that such defendant has prior convictions for certain crimes of violence and/or drugs.

{¶113} “Multiple punishment ... may be imposed where the defendant commits two crimes in pursuit of two independent, even if simultaneous, objectives.” *People v. Douglas* (1995) 39 Cal.App.4th 1385, 1393-1394, 46 Cal.Rptr.2d 534.

{¶114} Based on the foregoing, we find Appellant’s sixth assignment of error not well-taken and hereby overrule same.

{¶115} For the foregoing reasons, the judgment of the Court of Common Pleas, Stark County, Ohio, is affirmed.

By: Wise, J.

Farmer, J., concurs.

Edwards, P. J., concurs separately.

/S/ JOHN W. WISE

/S/ SHEILA G. FARMER

JUDGES

EDWARDS, P.J., CONCURRING OPINION

{¶116} I concur in the judgment and reasoning of the majority with the exception of the majority's statement in ¶112 that the gang statute requires that the defendant have prior convictions for crimes of violence and/or drugs.

{¶117} While in this case the appellant's past convictions were used to prove liability under the gang statute, I do not read the statutes to require that the defendant have actual prior convictions for the criminal acts which give rise to the finding of criminal activity and/or a pattern of gang activity necessary to prove liability under R.C. 2923.42(A).

Judge Julie A. Edwards

