

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-110530
Plaintiff-Appellee,	:	TRIAL NO. B-1007863
vs.	:	<i>JUDGMENT ENTRY.</i>
ANDINO POWELL,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. See S.Ct.R.Rep.Op. 3(A); App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Andino Powell appeals his convictions for murder with a specification and having a weapon while under a disability. We conclude that his assignments of error do not have merit, so we affirm the judgment of the trial court.

Powell was indicted for two counts of murder with specifications, felonious assault with specifications, and having a weapon while under a disability. The state alleged that Powell had shot and killed Michael Alexander near the Findlay Market area of Cincinnati. Powell filed a motion to suppress the identification testimony of two witnesses. The trial court denied the motion. The murder and felonious-assault counts were tried before a jury. At the conclusion of the trial, the jury found Powell guilty as charged. Following a bench trial, the trial court found Powell guilty of having a weapon while under a disability. The trial court imposed an aggregate sentence of 23 years to life in prison.

In his first assignment of error, Powell asserts that the trial court erred when it denied Powell's motion to compel and his motion to hold Crim.R. 16 unconstitutional. The prosecuting attorney filed a certificate of nondisclosure of two witnesses pursuant to Crim.R. 16(D). The record indicates that, in accordance with Rule 7(K) of the Hamilton County Rules of Practice of the Court of Common Pleas, the matter was referred to the presiding judge for a review of the prosecuting attorney's certification. *See* Crim.R. 16(F). No transcript of the in camera hearing was provided, so we must presume regularity. *See State v. Gonzalez*, 151 Ohio App.3d 160, 2002-Ohio-4937, 783 N.E.2d 903 (1st Dist.). We conclude that the trial court did not abuse its discretion when it refused to grant Powell's motion to compel.

In this assignment, Powell also challenges the constitutionality of Crim.R. 16. The state did not violate *Maryland v. Brady*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1961). Powell did not demonstrate that the state withheld any exculpatory evidence. Also, the Confrontation Clause of the Sixth Amendment was not implicated, as Powell was not prevented from cross-examining the witnesses. Finally, Powell did not demonstrate that his counsel's effectiveness was diminished in any way due to the state's nondisclosure. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The first assignment of error is overruled.

Although Powell's second assignment of error states that "[t]he trial court erred by not granting Powell's motion to review the states [sic] certification of non-disclosure," his argument is directed toward the content of the certification that the state filed.

Powell contends that the state's certificate of nondisclosure did not provide enough information about the reasons for nondisclosure. But we conclude that the prosecuting attorney's certification of nondisclosure satisfied the requirements of Crim.R. 16(C). The second assignment of error is overruled.

Powell's third assignment of error is that the trial court erred when it denied his motion to suppress the identification testimony of two witnesses. We note that the record does not contain a transcript of the suppression hearing, so we presume regularity in the hearing. And having reviewed the witnesses' testimony about the identification procedures, we conclude that the photograph arrays used in the identification procedures were not "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Neil v. Biggers*, 409 U.S. 188, 197, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972), citing *Simmons v. U.S.*, 390 U.S. 377, 384, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1969). The third assignment of error is overruled.

The fourth assignment of error is that Powell's convictions were against the manifest weight of the evidence. Having reviewed the record, we cannot say that the triers of fact lost their way and created such a manifest miscarriage of justice that we must reverse his convictions and order a new trial. *See State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). The assignment of error is overruled.

In his fifth assignment of error, Powell asserts that the trial court erred when it denied his motion for a mistrial due to prosecutorial misconduct. The state called Darwin Crutchfield. According to the state, it believed that Crutchfield would testify that he had been asked to lie by Powell about Powell's whereabouts when Alexander was shot. After giving some initial testimony, Crutchfield refused to testify. The trial court instructed the jury to disregard all of Crutchfield's testimony, but it denied Powell's motion for a mistrial. We conclude that the trial court's action in striking the testimony of Crutchfield was appropriate, and the trial court did not abuse its discretion when it denied the motion for a mistrial. *See State v. Sage*, 31 Ohio St.3d 173, 182, 510 N.E.2d 343 (1987). The fifth assignment of error is overruled.

In the final assignment of error, Powell asserts that the trial court erred when it refused to instruct the jury that it may consider credible evidence of

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noncompliance with police policy in determining the credibility of a witness's testimony about identification from a photographic array. *See* R.C. 2933.83(C)(3). We conclude that the trial court did not err in refusing to so instruct the jury because there was no evidence that police officers had failed to comply with R.C. 2933.83(B) in conducting the identification procedures. The sixth assignment of error is overruled.

Therefore, we affirm the trial court's judgment.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

SUNDERMANN, P.J., HENDON and FISCHER, JJ.

To the clerk:

Enter upon the journal of the court on August 29, 2012

per order of the court _____.
Presiding Judge