[Cite as *State v. Carson*, 2006-Ohio-2440.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 05AP-13 (C.P.C. No. 03CR-11-7717)
Rodney Carson,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

O P I N I O N

Rendered on May 16, 2006

Ron O'Brien, Prosecuting Attorney, and *Kimberly M. Bond,* for appellee.

Andrew P. Avellano, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

McGRATH, J.

{¶1} Defendant-appellant, Rodney Carson ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas convicting him of one count of aggravated murder with specification in violation of R.C. 2903.01, an unclassified felony, and one count of having a weapon while under disability in violation of R.C. 2923.13, a felony of the fifth degree.

{¶2} The charges in this case arose out of the shooting death of Eric Rawlings ("Rawlings") that occurred on March 14, 2003, in front of the C&S Lounge on East Fifth Avenue in Columbus, Ohio. The autopsy revealed that Rawlings received two gunshot

wounds, one to the back of the head, which caused Rawlings' death, and one to the palm of the right hand.

{¶3} On March 14, 2003, Henry Harris ("Harris") stopped at the C&S Lounge to get some take-out food. He saw appellant there, and as he was walking home, at approximately 5:30 p.m., Harris saw appellant riding a yellow bike.

{¶4} William Bentley ("Bentley"), the only witness to the shooting, testified that he had gone out to pick up some dinner and was walking back home when he saw two men arguing. According to Bentley, one man, later identified as Rawlings, was being held by his coat. The man holding Rawlings had a gun in his waistband. Bentley was approaching the men, and when he was approximately 40 feet away, he saw the gun-man pull out the gun and he heard Rawlings yell, "[D]on't shoot me." (Tr. Vol. 4, at 127.) Bentley saw the gunman hold Rawlings with one hand, and with the other hand, the gunman put the gun to Rawlings' head and fired once. The gunman then fired three or four more shots in succession. Bentley watched the gunman get on a yellow bike and ride down the street to a pay phone where the gunman was yelling for someone to come and get him. Bentley went into his house, obtained his cell phone, and called 911. Bentley returned to the street and saw that the gunman was still on the pay phone. Bentley described the gunman as wearing jeans, a mid-length down-filled coat that was "puffy." (Id., at 129.) Bentley then saw a van pull up to the body, and three young men got out of the van, and searched Rawlings' pockets. One of the men took Rawlings' wallet, but Bentley did not see what he did with it. After about 15-30 seconds, the men got back into the van and sped away.

{¶5} Dan Merce ("Merce") was walking his dog near the scene when he heard two men yelling and saw them pushing each other. Merce saw that one of the men had a gun and so Merce crossed the street to avoid them. Merce heard gunshots and ran down the street. When the gunshots ceased, Merce turned around to see one man lying on the ground, and the other man riding away on a yellow bike. Merce described the gunman as wearing a dark colored "puffy" jacket. (Tr. Vol. 6, at 136.) Merce also witnessed the van pulling up to the body, and the men from the van searching Rawlings' pockets.

{¶6} Numerous calls were made to 911. Bentley's call was logged at 8:31 p.m. Officer Cummings was the first to arrive at the scene, which was approximately two minutes after the dispatcher aired the report. Officer Cummings secured the scene, and the police log indicates that Rawlings was taken to the hospital via ambulance at 8:44 p.m., and homicide detectives were requested at 8:46 p.m.

{¶7} Christopher McCoy and his cousin, Mike Baber, were at Baber's residence, which is across the street from the pay phone, near the scene of the shooting. They went outside as police responded to the scene and saw an African-American male at the pay phone yelling and screaming. McCoy testified that he heard the man saying, "[C]ome fucking get me out of here. I did what I had to do." (Tr. Vol. 5, at 98.) McCoy recalled the man at the pay phone wearing jeans, a black do-rag, and a mid-length black leather jacket, and he did not recall any writing or any kind of lettering on the jacket. Baber also testified that he heard the man at the pay phone asking someone to come and get him out of there, and the man said, "I did what I had to do." (Id., at 171.) Baber described the man on the pay phone as wearing a medium length leather coat that was plain. Baber also testified that the man on the pay phone got on a yellow bike and rode away.

{¶8} Telephone records confirmed that an outgoing call was placed from the pay phone near the scene to a toll free number registered to Carolyn Clark ("Clark"). The call was placed at 8:36 p.m., and lasted approximately seven minutes. Clark testified that at that time she lived with appellant's father, Richard Carson, and that the toll free number was given to Richard Carson's children.

{¶9} In the months following the shooting, the police interviewed witnesses, appellant, and other suspects. On November 18, 2003, appellant was indicted by a Franklin County Grand Jury on one count of aggravated murder with two firearm specifications and one count of having a weapon under disability ("WUD"). Appellant pleaded not guilty to all of the charges and the case proceeded to jury trial. The jury found appellant guilty of aggravated murder including the two firearm specifications. The WUD charge was tried to the bench. Appellant stipulated to his prior conviction and the trial judge found appellant guilty of the WUD charge. After denying appellant's motion for a new trial, the trial court sentenced appellant to twenty years to life for the aggravated murder conviction and a mandatory consecutive three-year term for the gun specification. Appellant timely appealed.

{¶10} On appeal, appellant asserts the following six assignments of error:

> ASSIGNMENT OF ERROR I
>
> The trial court erred when it entered judgment against Appellant when the evidence was insufficient to sustain a conviction and was not supported by the manifest weight of the evidence.
>
> ASSIGNMENT OF ERROR II
>
> The trial court commits reversible error when it fails to grant a mistrial when trial spectators intimidate the jury and the jury

> believes those spectators are in some way connected to Appellant in violation of his right to a fair trial under the state and federal constitutions.
>
> ASSIGNMENT OF ERROR III
>
> The trial court commits reversible error when it fails to instruct the jury that they need not reach a unanimous decision regarding Appellant's guilt on the principal charge, before considering the lesser included offense.
>
> ASSIGNMENT OF ERROR IV
>
> Appellant's due process rights under the state and federal constitutions were violated when he was subjected to an in custody interrogation without being properly advised of his Miranda rights, and after he invoked his right to counsel.
>
> ASSIGNMENT OF ERROR V
>
> To the extent that the errors in Assignment of Error 3 and 4 are not cognizable under the plain error rule, Appellant was denied his right to effective assistance of counsel under the state and federal constitutions.
>
> ASSIGNMENT OF ERROR VI
>
> Appellant's right to due process under the state and federal constitutions was violated by prosecutorial misconduct when the state tried to shift the burden of proof to Appellant and solicited inadmissible testimony.

{¶11} By his first assignment of error, defendant contends that the evidence was insufficient to sustain a conviction and that his conviction was not supported by the manifest weight of the evidence.

{¶12} The Ohio Supreme Court described the role of an appellate court presented with a sufficiency of the evidence argument in *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus:

> An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a 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. (*Jackson v. Virginia* [1979], 443 U.S. 307, 99 S.Ct. 2781, followed.)

{¶13} Whether the evidence is legally sufficient is a question of law, not fact. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. In determining the sufficiency of the evidence, an appellate court must give "full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781. Consequently, the weight of the evidence and the credibility of the witnesses are issues primarily determined by the trier of fact. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, at ¶79; *State v. Thomas* (1982), 70 Ohio St.2d 79, 80. Thus, a jury verdict will not be disturbed unless, after viewing the evidence in a light most favorable to the prosecution, it is apparent that reasonable minds could not reach the conclusion reached by the trier of fact. *State v. Treesh* (2001), 90 Ohio St.3d 460, 484; *Jenks,* supra.

{¶14} A manifest weight argument is evaluated under a different standard. "The weight of the evidence concerns the inclination of the greater amount of credible evidence offered in a trial to support one side of the issue rather than the other." *State v. Brindley*, Franklin App. No. 01AP-926, 2002-Ohio-2425, at ¶35, citation omitted. In order for a court of appeals to reverse the judgment of a trial court on the basis that the verdict is

against the manifest weight of the evidence, the appellate court must disagree with the fact finder's resolution of the conflicting testimony. *Thompkins*, supra, at 387. The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether, in resolving conflicts in the evidence, 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. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. Id., quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶15} A defendant is not entitled to a reversal on manifest weight grounds merely because inconsistent evidence was presented at trial. *State v. Raver*, Franklin App. No. 02AP-604, 2003-Ohio-958, at ¶21. The determination of weight and credibility of the evidence is for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230. The rationale is that the trier of fact is in the best position to take into account inconsistencies, along with the witnesses' manner and demeanor, and determine whether the witnesses' testimony is credible. *State v. Williams*, Franklin App. No. 02AP-35, 2002-Ohio-4503, at ¶58; *State v. Clarke* (Sept. 25, 2001), Franklin App. No. 01AP-194. The trier of fact is free to believe or disbelieve all or any of the testimony. *State v. Jackson* (Mar. 19, 2002), Franklin App. No. 01AP-973; *State v. Sheppard* (Oct. 12, 2001), Hamilton App. No. C-000553. Consequently, although an appellate court must act as a "thirteenth juror" when considering whether the manifest weight of the evidence requires reversal, it must give great deference to the fact finder's determination of the witnesses' credibility. *State v.*

Covington, Franklin App. No. 02AP-245, 2002-Ohio-7037, at ¶22; *State v. Hairston*, Franklin App. No. 01AP-1393, 2002-Ohio-4491, at ¶17.

{¶16} With respect to his sufficiency claim, appellant advances two arguments. First, appellant contends that there is insufficient evidence to sustain his conviction because no one identified appellant as the shooter, there is no physical evidence linking appellant to the shooting, and the evidence points strongly to another suspect, specifically Rashawn Garner ("Garner"). Thus, under this argument, appellant argues that his conviction should be vacated in its entirety. Second, appellant argues in the alternative that the facts do not support an aggravated murder conviction because there is no evidence that the murder occurred with prior calculation and design as is required under R.C. 2903.01(A)'s definition of aggravated murder. Thus, under his alternative argument, appellant argues that his conviction for aggravated murder should be vacated and a conviction for murder ordered.

{¶17} With respect to appellant's argument that there is insufficient evidence to determine that he was the shooter, the Supreme Court of Ohio has held that "[a] conviction can be sustained based on circumstantial evidence alone." *State v. Franklin* (1991), 62 Ohio St.3d 118, 124, citing *State v. Nicely* (1988), 39 Ohio St.3d 147, 154-155. In fact, circumstantial evidence may " 'be more certain, satisfying and persuasive than direct evidence.' " *State v. Ballew* (1996), 76 Ohio St.3d 244, 249, quoting *State v. Lott* (1990), 51 Ohio St.3d 160, 167, quoting *Michalic v. Cleveland Tankers, Inc*. (1960), 364 U.S. 325, 330, 81 S.Ct. 6, 11. As will be explained, we find that there is sufficient evidence in the record to establish the shooter's identity in this case.

{¶18} Harris testified that he saw appellant on March 14, 2003 at the C&S Lounge, and as he was walking home from the C&S Lounge, he saw appellant riding a yellow bike at approximately 5:30 p.m. Bentley and Merce both testified that two men were arguing outside the C&S Lounge, and after the shooting occurred, the shooter rode a yellow bike down the street. Bentley testified that the shooter rode the bike to the pay phone at 2909 East Fifth Avenue. McCoy and Baber testified that they saw a man with a yellow bike at the pay phone and they heard him yelling, "I did what I had to do." (Tr. Vol. 5, at 98 and 171.) The evidence in the record further establishes that appellant was the man using the pay phone. Not only did appellant admit using the pay phone that night, the phone records indicate that only one call was placed within minutes of the murder, and the call was placed to the residence where appellant's father lived.

{¶19} Appellant argues that there are inconsistencies in the record. Specifically, appellant contends that Bentley's testimony is suspect because Bentley testified that he saw the shooter go the pay phone, and he saw a van pull up to the scene at this same time; therefore, appellant argues that Bentley must have had to look away to see the van, and this renders his testimony incredulous. However, as discussed above, there was other testimony, including that from Merce, McCoy, and Baber relating to the use of the pay phone in the minutes after the murder. It is not proper to single out the testimony of one witness, as defendant has, to argue that the testimony of all the other witnesses is not believable. Further, we do not find that Bentley's testimony is at odds with the other witnesses.

{¶20} Taken together, the testimony of all the witnesses is clearly sufficient to establish that the shooter was indeed the person using the pay phone, and the record is

also clearly sufficient to establish that appellant was the person using the pay phone. To the extent that appellant attempts to point out inconsistencies in the testimony, we reiterate that such issues are primarily determined by the trier of fact as the trier of fact is in the best position to determine whether the witnesses' testimony is credible. *Jenks,* supra; *Williams*, supra.

{¶21} Appellant also contends under his first assignment of error that the evidence in this case points more strongly towards another suspect, Garner. According to the record, the jury was well aware that the police approached Garner as a suspect on the night of the murder. The record contains testimony from Garner himself, explaining that he came onto the scene after the murder had taken place. Garner testified that he was on a COTA bus, and that the bus took a detour because Fifth Avenue was closed due to the police responding to a report that a man had been shot. Garner stated that he had to be dropped off at a different stop, and shortly thereafter, while he was walking down the street, he was approached by the police. Charles Kreisel, the COTA bus driver testified that the bus did have to be detoured after the police closed Fifth Avenue, and that he did recall letting one man off the bus at the location where Garner said he was dropped off. Also, Merce, Baber, and McCoy testified that they did not recall the back of the shooter's jacket having lettering on it, but that it was a plain, black jacket. The record established that the jacket that Garner was wearing that night was a black leather jacket with large lettering on the back, and it was not a "puffy" jacket as Bentley and Merce had described. Appellant advanced his theory of another shooter at trial and the jury rejected it. As stated above, there was sufficient evidence in the record for the jury to reach its conclusion.

{¶22} Thus, based on the evidence and testimony of all the witnesses, when viewed in a light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt that appellant was indeed the person who shot Rawlings. Similarly, the evidence is sufficient to sustain not only the two gun specifications, but also the WUD conviction.

{¶23} In his alternative argument, appellant argues that there is insufficient evidence to sustain his conviction for aggravated murder, because there is no evidence that the act was committed with prior calculation and design as required by R.C. 2903.01(A). In defining the offense of aggravated murder, R.C. 2903.01(A) provides that "[n]o person shall purposely, and with prior calculation and design, cause the death of another[.]"

{¶24} Prior calculation and design requires something more than instantaneous deliberation. *State v. Cotton* (1978), 56 Ohio St.2d 8, paragraph two of the syllabus. Where evidence adduced at trial reveals the presence of sufficient time and opportunity for the planning of an act of homicide to constitute prior calculation, and the circumstances surrounding the homicide show a scheme designed to implement the calculated decision to kill, a finding by the trier of fact of prior calculation and design is justified. Id., paragraph three of the syllabus. There is no bright line test to determine whether prior calculation and design are present, rather each case must be decided on a case-by-case basis. *State v. Taylor* (1997), 78 Ohio St.3d 15. "Prior calculation and design can be found even when the killer quickly conceived and executed the plan to kill within a few minutes." *State v. Coley* (2001), 93 Ohio St.3d 253, 264.

{¶25} While appellant argues that the State failed to prove that this was anything more than an argument that turned violent, we find that the record contains sufficient evidence from which the jury could have concluded, beyond a reasonable doubt, that appellant acted with prior calculation and design. Merce and Bentley both testified that they heard the two men arguing. Merce heard one man say, "You're my nigger. You're my nigger. You're my nigger. What's up? Don't do this. Stop." (Tr. Vol. 6, at 130-131.) The other man responded, "It's all good. It's all good. Throw it across the street. You know you're my nigger. We're friends. It's all good." (Id. at 131.)

{¶26} As pointed out by appellee, the first statement is easily attributed to the victim, Rawlings. Thus, the second statement, is attributed to appellant. The conversation indicates that these two men knew each other and that appellant wanted something from Rawlings, as he indicated for Rawlings to "throw it across the street."

{¶27} Also, the manner in which Rawlings was killed supports the finding of prior calculation and design. If a victim is killed in a cold-blooded, execution-style manner, the killing bespeaks aforethought, and a jury may infer prior calculation and design. See *State v. Trewartha*, Franklin App. No. 04AP-963, 2005 Ohio 5697; *State v. Campbell* (2000), 90 Ohio St.3d 94; *State v. Palmer* (1997), 80 Ohio St.3d 543*; Taylor*, supra. The record in this case reveals that appellant held Rawlings with one arm, while he positioned his other arm so that the gun was against Rawlings' head. Rawlings yelled, "Don't shoot me," and appellant pulled the trigger. Appellant then fired three to four more shots at Rawlings.

{¶28} When construing the evidence in a light most favorable to the prosecution, which we are required to do, we find that there is sufficient evidence to support the jury's

finding that appellant purposely killed Rawlings with prior calculation and design. See *State v. Goodwin* (1999), 84 Ohio St.3d 331 (finding sufficient evidence of prior calculation and design where defendant placed a gun to the head of an unresisting victim, pulled the trigger, then placed the gun to the head of another store clerk and continued robbing the store); *Taylor* (finding sufficient evidence of prior calculation and design when defendant exchanged words with the victim, moved his girlfriend out of the way to strategically position the victim and then continued shooting the victim after he was down).

{¶29} Similarly, we cannot say that the verdicts are against the manifest weight of the evidence. The basis for appellant's manifest weight argument is Bentley's alleged, either mistaken or untruthful, testimony, and the "greater amount of evidence to show that Mr. Garner was the shooter." (Appellant's Brief, at 12.) A conviction, however, is "not against the manifest weight of the evidence simply because the jury believed the prosecution testimony." *State v. Moore*, Montgomery App. No. 20005, 2004-Ohio-3398, quoting *State v. Gilliam* (Aug. 12, 1998), Lorain App. No. 97CA006757. The weight to be given to the evidence and the credibility of the witnesses are determinations that are primarily for the trier of fact. See *DeHass*, supra, at paragraph one of the syllabus. Moreover, as discussed above, Bentley's testimony is not necessarily at odds with the rest of the evidence in the record. We find that there is nothing to indicate that the jury clearly lost its way or that any miscarriage of justice resulted.

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

{¶31} In his second assignment of error, appellant argues that the trial court abused its discretion when it failed to declare a mistrial. This argument is based on the

fact that during the trial two men entered the courtroom and sat in the gallery seats in the middle section of the courtroom. During a break, one juror observed approximately 30 uniformed officers escort the men from the building. The juror reported this to the other jurors. The incident was brought to the attention of the court, and each juror was questioned about what they had seen in the courtroom, heard from other jurors, how they felt about the incident, and whether they felt the incident affected their ability to render a fair and impartial verdict. Each juror, after discussing the incident with the court, stated that the incident did not affect his or her ability to perform their duty to render a fair and impartial verdict. Outside the jury's presence, appellant's trial counsel indicated that the two men were appellant's brothers. Appellant's counsel requested five minutes to speak with her client, which the court granted. When proceedings resumed, the following exchange took place:

> [The court]: For the record, Miss Beauchamp, I understand that you had a discussion with your client about the events that have transpired here.
>
> [Appellant's counsel]: Yes, Your Honor, I have, and Mr. Kelly was present also. He and I have consulted, and at the direction of our client, we have determined not to request a mistrial at this time.

(Tr. Vol. 7, at 85.)

{¶32} Appellant now argues that the trial court abused its discretion in failing to grant a mistrial.

{¶33} "In cases involving outside influences on jurors, trial courts are granted broad discretion in dealing with the contact and determining whether to declare a mistrial or to replace an affected juror." *State v. Conway* (2006), 108 Ohio St.3d 214, 245,

quoting *State v. Phillips* (1995), 74 Ohio St.3d 72, 88. "When a trial court learns of an improper outside communication with a juror, it must hold a hearing to determine whether the communication biased the juror." *State v. Phillips* (1995), 74 Ohio St.3d 72, 88. " The complaining party must show actual prejudice, see, generally, Crim.R. 33(A), *i.e*., he must show that the communication biased one or more jurors." *State v. Herring*, (2002), 94 Ohio St.3d 246, 259 (citations omitted).

{¶34} In the case sub judice, the record reveals that the trial court held a hearing to examine each juror separately. While one juror testified that she felt intimidated by the men when they were in the courtroom because they were acting like "tough guys," and most of the jurors speculated that the men were affiliated with appellant, *each* juror testified that the incident would not affect his or her ability to be fair and impartial to both sides. "A trial court may rely upon a juror's testimony as a basis for finding that her impartiality was not affected." Id. at 259. Finding no abuse of discretion by the trial court, we overrule appellant's second assignment of error.

{¶35} Through his third assignment of error, appellant argues that the trial court improperly instructed the jury. Specifically, appellant argues that the trial court failed to inform the jury that it did not have to reach a unanimous verdict as to aggravated murder before it considered the lesser included offense of murder.

{¶36} Appellant did not object to the jury instructions at trial, and thus has waived all but plain error. *State v. Slagle* (1992), 65 Ohio St.3d 597; *State v. Hodge*, Franklin App. No. 04AP-294, 2004 Ohio 6980. Plain error does not exist unless it can be said that but for the error, the outcome of the trial would clearly have been otherwise. *State v. Moreland* (1990), 50 Ohio St.3d 58. "Notice of plaintiff error under Crim.R. 52(B) is to be

taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus.

{¶37} Appellant relies on *State v. Thomas* (1998), 40 Ohio St.3d 213, in support of his position that the trial court committed reversible error when it failed to properly instruct the jury. In *Thomas*, the Supreme Court of Ohio held that "* * * [t]he jury is not required to determine unanimously that the defendant is not guilty of the crime charged before it may consider a lesser included offense." Id. at paragraph three of the syllabus. In reaching its holding in *Thomas*, the court was resolving a conflict between two Ohio appellate districts, one which held that the jury did have to unanimously agree that the defendant is not guilty of the greater offense before addressing any lesser included offenses, the other holding that the jury did not have to reach such unanimity with respect to the greater offense before addressing a lesser included offense. However, even though the Supreme Court rejected the "acquittal first" instruction approved by the court of appeals, the Supreme Court nonetheless upheld the jury instructions given in *Thomas*. The jury instructions given in *Thomas* were as follows:

> If you find that The State has proven beyond a reasonable doubt all of the essential elements of the crime of aggravated murder, then your verdict must be that the Defendant is guilty of aggravated murder; and you will not consider the lesser offense.
>
> However, if you find that The State has failed to prove beyond a reasonable doubt the element of prior calculation and design, then your verdict must be that the Defendant is not guilty of aggravated murder.

> You will then proceed with your deliberations and decide whether The State has proven beyond a reasonable doubt all of the essential elements of the lesser crime of murder.

Id. at 219.

{¶38} In finding that the jury instructions given in *Thomas* were not "acquittal first" instructions, the court stated:

> This instruction does not expressly require unanimous acquittal on the charged crime, but rather addresses possible disagreement by the jury on the element of prior calculation and design and a corresponding inability to reach a verdict of guilty of aggravated murder * * *. In our opinion, this instruction has negligible coercive potential because it speaks to the jury's inability to find, whether unanimously or not, a certain element of the greater offense. We are not persuaded that the trial court's instruction unduly prejudiced the appellee, and thus we affirm his conviction of aggravated murder * * *.

Id. at 220.

{¶39} In the case before us, the trial court instructed the jury as follows:

> If you find that the State failed to prove prior calculation and design beyond a reasonable doubt, * * * you must find the defendant not guilty of aggravated murder and consider the lesser offense of murder.

(Tr. Vol. 10, at 12.)

{¶40} This court has previously upheld analogous "if you find" instructions as not violating *Thomas*. See *State v. Wright* (Nov. 13, 2001), 10th App. No. 00AP-985; *State v. Roe* (Sept. 22, 1992), 10th App. No. 92AP-334; *State v. Greene* (Mar. 31, 1998), Franklin App. No. 90AP-646 (recognizing that what is of significance is that nowhere in the instructions were the jurors expressly told that they must unanimously find [the defendant] not guilty of a greater offense before they could consider a lesser offense). Likewise, in the case now before us, we cannot say that the jury instructions given by the trial court

were improper, and thereby prejudiced appellant. Therefore, we find no error, let alone any plain error, and accordingly overrule appellant's third assignment of error.

{¶41} In his fourth assignment of error, appellant argues that his constitutional rights were violated when he was subjected to a custodial interrogation without properly being informed of his rights pursuant to *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S. Ct. 1602, and that he requested his attorney's presence during the November 8, 2003 interview with the police. Therefore, appellant argues that his statements should have been suppressed.

{¶42} First, we note that appellant did not assert a *Miranda* violation in the motion to suppress, nor in any supplemental memoranda filed subsequent to the motion, or at the suppression hearing. Accordingly, appellant has waived all but plain error.

{¶43} Appellant was interviewed by the police on two separate occasions. At the first interview on June 24, 2003, the record establishes that Detective Rond reviewed the rights waiver form with appellant, and informed him of his right to stop answering questions at any time. At the second interview on November 8, 2003, the one with which appellant takes issue, Detective Carney again read the rights waiver form, went through appellant's *Miranda* rights, and appellant stated that he understood those rights. The record establishes that appellant was advised of his *Miranda* rights at both interviews, thus we find no merit to appellant's argument regarding a *Miranda* violation.

{¶44} Also contained in his fourth assignment of error is appellant's argument that he invoked his right to counsel, and, therefore, any statements made by him at the November 8, 2003 interview should have been suppressed due to the violation of *Edwards v. Arizona* (1981), 451 U.S. 477, 101 S.Ct. 1880. At the November 8, 2003

interview, Detective Carney had appellant read out loud portions of the rights waiver form. After appellant read a portion of the form, the following exchange took place:

> Detective Carney: Okay. Do you understand all that?
>
> [Appellant]: Yeah.
>
> Detective Carney: Do you have any questions regarding that?
>
> [Appellant]: (witness shook head)
>
> Detective Carney: Okay.
>
> [Appellant]: My lawyer's name is Sarah Beauchamp so –
>
> Detective Carney: Okay. Do me a favor and read the waiver section. It doesn't mean you agree. It just means you've read it.

(Tr. Vol. 1, at 55.)

{¶45} Thereafter, appellant indicated that he understood it, he signed that he read it and understood it, and the interview continued. This above cited reference to appellant's attorney is what appellant argues was his request for counsel.

{¶46} As recently stated by the Supreme Court of Ohio in *State v. Jackson*, (2006), 107 Ohio St.3d 300, 309, 2006-Ohio-1:

> Under the *Fifth Amendment*, an accused must clearly invoke his constitutional right to counsel in order to raise a claim of deprivation of counsel. "The suspect must unambiguously request counsel. * * * [H]e must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, *Edwards [v. Arizona* (1981), 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378] does not require that the officers stop questioning the subject." *Davis v. United States* (1994), 512 U.S. 452, 459, 114 S.Ct. 2350, 129 L.Ed.2d 362.

{¶47} In *Jackson* the Supreme Court found that Jackson's statements "I talked to a lawyer or something" or "when I talk to my lawyer" did not amount to a clear, unambiguous, or unequivocal invocation of the right to counsel. Similarly, the Supreme Court has held that "I think I need a lawyer" is not an unequivocal assertion of the right to counsel. *State v. Henness* (1997), 79 Ohio St.3d 53, 62-63. In *State v.* Brown (2003), 100 Ohio St.3d 51, 2003-Ohio-5059, the court held that "don't I supposed to have a lawyer present" was "at best ambiguous." Id. at 56. In *Jackson*, the court went on to state:

> Other courts have found similar remarks to be ambiguous and thus not invoking the constitutional right to counsel. See, e.g., *Mueller v. Angelone* (C.A.4, 1999), 181 F.3d 557, 573-574 (defendant's question to police, "do you think I need an attorney here" answered by headshaking, a shrug, and the statement "You're just talking to us," was not an unequivocal request); *Dormire v. Wilkinson* (C.A.8, 2001) 249 F.3d 801 ("Could I call my lawyer?" followed by police response of "yes" did not invoke the right to counsel); *United States v. Zamora* (C.A.10, 2000), 222 F.3d 756, 766 ("I might want to talk to an attorney" was not "an unequivocal request for counsel").

Id. at 309-310.

{¶48} Here, we find that appellant's alleged request for counsel was neither clear nor unambiguous. As appellee points out, this was not appellant's first contact with the criminal justice system. Appellant did not request an attorney, but merely stated that he had one. As in the previously-cited cases analyzed by the Supreme Court of Ohio, we find that appellant's statement is not sufficient to invoke the constitutional right to counsel. Again, appellant being unable to establish any error, let alone plain error, we overrule appellant's fourth assignment of error.

{¶49} In his fifth assignment of error, appellant argues that to the extent that his third and fourth assignments of error are not cognizable under the plain error rule, appellant was denied his right to effective assistance of counsel. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington* (1984), 466 U.S. 668, 686, 104 S.Ct. 2052. In order to establish a claim of ineffective assistance of counsel**,** a defendant must first demonstrate that his trial counsel's performance was so deficient that it was unreasonable under prevailing professional norms. Id. at 687. The defendant must then establish "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

{¶50} According to *Strickland*:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687.

{¶51} Appellant argues that his trial counsel's performance was deficient because his counsel failed to object to the jury instruction on aggravated murder that did not contain language informing the jury that it did not have to be unanimous in finding appellant not guilty of that charge before considering the lesser included charge of murder. Appellant also argues that his trial counsel was ineffective for failing to object to the admission of appellant's statements to the police on November 8, 2003, due to the failure of the state to properly Mirandize him. In *State v. Braxton (*June 6, 1985*),* Fra. App. No. 84AP-924, this court held that where the failure to object does not constitute plain error, the issue cannot be reversed by claiming ineffective assistance of counsel. Id. This contention was recently reiterated by this court in *State v. Horsley*, Franklin App. 05AP-350, 2006-Ohio-1208, ¶41:

> "Defense counsel's failure to object does not auto-matically become an ineffective assistance of counsel unless the failure to object rises to the level of plain error." *State v. Koogler* (Sept. 6, 1984), Franklin App. No. 84AP-221. 1984 Ohio App. LEXIS 10741, citing *United States v. DeWolf* (C.A.1, 1982), 696 F.2d 1. To allow a defendant to claim ineffective assistance of counsel based on a failure to object at a time when error could be corrected or avoided would allow a defendant to whipsaw the state where a plain error claim failed. * * *

{¶52} We held previously, in addressing appellant's third and fourth assignments of error, that the conduct complained of did not constitute error, let alone rise to the level of plain error. Those findings do not change when viewed in a claim that counsel was ineffective. Thus, we find that appellant has failed to demonstrate that trial counsel committed errors so serious that, but for those errors, there would be a reasonable

probability that the outcome of the trial would have been different. Accordingly, appellant's fifth assignment of error is overruled.

{¶53} In his sixth assignment of error, appellant argues that his due process rights were violated by prosecutorial misconduct, which consisted of appellee's solicitation of inadmissible testimony and appellee's attempt to shift the burden of proof to appellant.

> "[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S.Ct. 940, 947, 71 L.Ed.2d 78, 87. "[T]here can be no such thing as an errorfree, perfect trial, and * * * the Constitution does not guarantee such a trial." *United States v. Hasting* (1983), 461 U.S. 499, 508-509, 103 S.Ct. 1974, 1980, 76 L.Ed.2d 96, 106.

State v. Lundgren, (1995), 73 Ohio St.3d 474, 487.

{¶54} "We will not deem a trial unfair if, in the context of the entire trial, it appears clear beyond a reasonable doubt that the jury would have found the defendant guilty even without the improper comments." *State v. Skatzes* (2003), 104 Ohio St.3d 195, 229.

{¶55} Appellant's first allegation of prosecutorial misconduct is that during the prosecutor's rebuttal in closing arguments she attempted to shift the burden of proof to appellant. The prosecutor stated, "for you to let him go, he has to prove to you that he was at the scene after the murderer was gone because the detective told him, 'we have a witness to you being at the scene.' " (Tr. Vol. 9, at 197.) Appellant's counsel objected to the statement, and the trial court overruled the objection.

{¶56} The prosecuting attorney's trial conduct can only be made a ground for error on appeal if the conduct deprives the defendant of a fair trial. Additionally, we must consider the conduct about which appellant complains in the context of the entire trial.

Where is it apparent from the facts and circumstances of the case that the discretion of the trial court has not been abused, a reviewing court will not ordinarily interfere. *State v. Saunders* (Nov. 21, 2000), Franklin App. No. 99AP-1486. "In general, prosecutors are given considerable latitude in opening statement and closing argument." *State v. Mayes*, Franklin App. No. 03AP-1154, 2005-Ohio-1769, ¶27. In closing arguments, a prosecutor may comment upon the testimony and other evidence and may suggest reasonable inferences to be drawn therefrom. Id.; *State v*. Furman, 11th App. No. 2001-L-213, 2003-Ohio-2100.

{¶57} While we do not condone, and caution against the use of the language utilized by the prosecutor in this instance, after careful review of the transcript from appellant's trial, we are unable to conclude that appellee's closing arguments denied appellant a fair trial. First, it is important to note the context in which the prosecutor's statement was made, which was during appellee's rebuttal during closing argument. The prosecutor was rebutting facts set forth by appellant in his statements to the police throughout their investigation. The prosecutor stated as follows:

> He saw the shoes. Now, the explanation for that big faux pas is that he was drunk, upset, and confused and he imagined seeing shoes in the street when he's talking to the police.
>
> No, what he was trying to do was convince the police officer that he had actually been at the scene after the murder and had seen these things – yeah, I saw the body. I saw the shoes left behind – to give him some kind of credibility with the police officer when in reality none of that is true. The shoes never came off the feet of Eric Rawlings until he was at the coroner's office.
>
> He has to be at the scene. For you to let him go, he has to prove to you that he was at the scene after the murderer was

> gone because the detective told him, "we have a witness to you being at the scene."

(Tr. Vol. 9, at 197.)

{¶58} Second, the prosecutor's remark in this case was isolated and did not pervade throughout appellee's closing. Third, the trial court clearly instructed the jury that opening and closing arguments are not evidence, but the opinion and observations of counsel. Further, and perhaps most importantly, the trial court specifically instructed the jury on the burden of proof, in part, as follows:

> The defendant is presumed innocent unless his guilt is established beyond a reasonable doubt. The defendant must be acquitted unless the state has produced evidence which convinces you beyond a reasonable doubt of every essential element of the crimes charged in the indictment.

(Tr. Vol. 10, at 5.)

{¶59} The trial court reiterated appellee's burden of proof when instructing on both aggravated murder and the lesser included offense of murder as well as the specifications. In conclusion, the trial court instructed:

> If you find that the state has proved beyond a reasonable doubt all of the essential elements of the offenses charged in the indictment, your verdict must be guilty as to such crime according to your findings.
>
> If you find that the state has failed to prove beyond a reasonable doubt any one of the essential elements of the offenses, your verdict must be not guilty as to such offense.

(Id., at 13-14.)

{¶60} A jury may be presumed to follow the instructions of the court. *State v. Henderson*, Franklin App. No. 04AP-1212, 2005-Ohio-4970 ¶19 (citations omitted). After reviewing the closing argument in its totality, and after reviewing the comment in the

context of the entire trial, we do not find that the trial court erred in overruling appellant's objection.

{¶61} Also contained in his final assignment of error alleging prosecutorial misconduct is appellant's argument that appellee solicited inadmissible testimony. Appellant directs us to the direct examination of Detective Rond. The prosecutor was questioning the detective on various standard procedures that take place during an investigation regarding witnesses' statements, how the summaries for them are prepared and the like. The following exchange occurred:

> [Prosecutor]: When did you settle on Rodney Carson as the shooter in this case?
>
> [Witness]: After I spoke –
>
> [Appellant's Counsel]: Objection. His opinion is irrelevant.
>
> The Court: Overrule.
>
> [Prosecutor]: The question was when.
>
> [Witness]: When, May 24.

(Tr. Vol. 7, at 149-150.)

{¶62} Appellant argues that this question permitted the detective to tell the jury that it is his opinion that appellant is guilty, and that such is prohibited under Evid.R. 701 and 704. We find no merit to appellant's argument.

{¶63} The question clearly did not elicit an opinion from the detective as to appellant's guilt. Even the brief exchange set forth above establishes that the prosecutor was inquiring about when appellant became a suspect in this case. There is nothing prejudicial in this question as the jury was obviously aware that appellant had been a

suspect since he was ultimately charged with the crime. Further, the time frame was relevant in this case because there was a period of months between the murder and the indictment, and because there were multiple suspects in the case. Thus, it was necessary to demonstrate the progression of the investigation.

{¶64} After reviewing the prosecutor's question to the detective and the comment made in closing argument in the context of the entire trial, we do not find that the trial court erred in overruling appellant's objection, nor are we able to find prejudice to appellant such that appellant was denied a fair trial. Accordingly, appellant's sixth assignment of error is overruled.

{¶65} For the foregoing reasons, appellant's six assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

SADLER and TRAVIS, JJ., concur.

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