[Cite as *State v. Jennings*, 2009-Ohio-6840.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 09AP-70
v.	:	(C.P.C. No. 08CR-11-2825)
Kevin E. Jennings,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	
State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 09AP-75
v.	:	(C.P.C. No. 08CR-11-2826)
David A. Mock,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 24, 2009

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert,* for appellee.

Keith O'Korn, for appellant Kevin E. Jennings.

Mark M. Hunt, for appellant David A. Mock.

APPEALS from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Defendants-appellants, Kevin E. Jennings and David A. Mock (collectively, "defendants"), appeal from judgments of the Franklin County Court of Common Pleas finding them guilty, pursuant to jury verdict, of murder and aggravated robbery in connection with the death of Robert Hunter. Because (1) the trial court did not err in overruling defendants' objections to the prosecution's use of peremptory challenges, (2) the trial court did not abuse its discretion in omitting defendants' requested accomplice instruction from the jury charge, (3) sufficient evidence and manifest weight of the evidence support the jury's verdict, (4) the trial court did not violate defendants' rights under the federal and state confrontation clauses, (5) Jennings' conviction for murder under R.C. 2903.02(B) does not violate his rights to due process and equal protection, (6) the trial court did not err in convicting Jennings of felony murder rather than involuntary manslaughter, (7) the trial court did not plainly err in submitting an aggravated robbery instruction in the jury charge, (8) no prosecutorial misconduct is evident on the record, and (9) Jennings' trial counsel did not render ineffective assistance of counsel, we affirm.

I. Procedural History

{¶2} On November 29, 2006, two bullets struck and killed Robert Hunter inside his home at 667 East Woodrow Avenue. Columbus Police Officer James Jude heard the two shots in the vicinity of the Lincoln Park apartments and then observed two males running from Hunter's house. Officer Jude was unable to locate the two individuals that night, but he responded to the home to find the victim unresponsive on his couch. During

a search in the vicinity of the crime scene, police recovered a 9-millimeter magazine clip in an alley near the Lincoln Park apartments. In April of 2008, police arrested Mock, and Jennings turned himself into police the next day. The state indicted defendants on one count each of aggravated murder, aggravated robbery, and aggravated burglary, each with a firearm specification. The state tried defendants jointly.

{¶3} During voir dire, Jennings twice objected on racial discrimination grounds to the prosecution's use of peremptory challenges. The first objection arose when the prosecution excused an African-American potential juror; the second came when the prosecution used a peremptory challenge on an African-American potential alternate juror. In both objections, the prosecution provided explanations for the peremptory challenges; the trial court accepted them as racially neutral and overruled Jennings' objections.

{¶4} At the trial commencing December 4, 2008, the parties stipulated the two spent shell casings found on Hunter's front porch and the bullet fragment retrieved from Hunter's body came from a 9-millimeter gun. The criminalist who examined the evidence for the prosecution could neither identify nor eliminate the casings as having come from the magazine clip recovered near the crime scene. Crime scene investigators also recovered from Hunter's house significant amounts of marijuana and cocaine, a .32 Derringer handgun on the floor underneath Hunter's hand, and a .357 Magnum revolver underneath one of the couch's cushions. Fingerprints lifted from the scene did not match those of Hunter, Jennings or Mock.

{¶5} Kenya Nettles, who lived in the Lincoln Park apartments across from Hunter's house, testified she saw three men the night of Hunter's murder and confronted

them because she thought they were trying to break into her apartment. About five minutes later, she heard two gunshots. Nettles then saw one man running north through an alley and two others running through a courtyard. Nettles did not recognize a photograph of Mock police showed her before trial, but she identified Jennings in court as one of the men she saw the night of Hunter's murder.

{¶6} Victor Brown ("Victor"), a witness for the prosecution, was in prison on a parole violation in January 2007. While in prison, Victor saw a news story about Hunter's murder in a Crime Stoppers segment. Afraid that he might be implicated in the crime, Victor arranged to meet with police in April 2007. At trial, Victor admitted to lying in his first two conversations with detectives in an effort to protect Jennings, his cousin. Victor testified that in his third and final interview with police he nonetheless told police what actually happened the night of Hunter's murder. Before providing his final statement to police, Victor signed a *Miranda* waiver even though Detective Althea Young told Victor she could not guarantee he would not be charged with a crime. The state never charged Victor with any crime related to Hunter's murder.

{¶7} Testifying at trial to what he told Detective Young, Victor stated that Jennings, who also goes by "Little Kev," called him several times in November 2006 seeking Victor's assistance to plan and carry out a "lick" or a robbery. (Tr. 44.) According to Victor, Jennings said he planned to steal marijuana by simply walking into a known drug dealer's house and taking it. Victor later learned Hunter was a very heavy man and left his door open at night because he was unable to move around and let people in his house. Victor testified that, after he met with Jennings, he thought the plan was ill-advised because "there's a police station, like a precinct right down the street from the house." (Tr.

48.) Victor also said he warned Jennings that Hunter might have a gun inside his house because "what drug dealer dude don't got a gun?" (Tr. 50.)

{¶8} Victor testified a man with the street name "Face" eventually joined Victor and Jennings. In court, Victor identified Mock as the man he knew as "Face." According to Victor, Mock was the one who said they were going to go through with the lick because they were already at Hunter's house. Both Mock and Jennings revealed to Victor that they had guns with them, but Jennings said his gun was not loaded. Mock's weapon, according to Victor's testimony, was a black 9-millimeter. Victor testified that, after seeing their weapons, he withdrew from the situation and began to walk away. When he heard a gunshot, he turned around to see Jennings on the steps leading to the porch and Mock on the porch firing shots. Victor then fled from the house toward an alley, and defendants ran in a different direction. Victor did not know Hunter died until Jennings saw the death reported on the news and told Victor the next day.

{¶9} The prosecution also called Cawthon Brown ("Cawthon"), who is not related to Victor, as a witness. Cawthon testified he was "acquaintances" with both defendants in the summer of 2007. (Tr. 296, 300.) One day when they were smoking marijuana together, Cawthon said Mock confessed to him that Mock shot "the big guy" when defendants attempted a lick on Woodrow Avenue. (Tr. 296-98.) According to Cawthon, Mock said he "had to dump shells in the dude" because the man fired at them first. (Tr. 296-98, 313.) Cawthon further testified Mock said he was "mad" at Jennings because Jennings ran following the shooting. (Tr. 297, 302.) Cawthon stated at trial that, when he asked Jennings why Mock was mad at Jennings, Jennings' only response was that something had happened but "he didn't want to talk about it." (Tr. 302.)

{¶10} In September 2007, Cawthon was in jail awaiting a community control revocation hearing when he contacted police to share what defendants told him. At the time, Cawthon knew defendants only by their street names, but he told Detective Young he had taken "Face" to obtain his driver's license that month. (Tr. 408-09.) In November 2007, Cawthon identified Mock from a photo array, and Cawthon later identified Jennings from a different photo array. At some point while he was still in jail, Cawthon asked detectives the proper procedures for claiming the Crime Stoppers reward money, but he never attempted to collect it.

{¶11} Detective Young testified that her investigation, including the interviews with Victor and Cawthon, led to Mock's arrest in April 2008. After his arrest, Mock admitted his nickname is "Face-Off" or "Face," but he denied any involvement in Hunter's murder. (Tr. 412.) Jennings turned himself into authorities the day after Mock's arrest. The prosecution rested after Detective Young's testimony. Neither defendant called any witnesses.

{¶12} Following deliberations, the jury found both defendants guilty of murder, aggravated robbery and firearm specifications. The trial court sentenced Jennings to 15 years to life in prison, plus one mandatory year for the firearm specification; it sentenced Mock to 15 years to life in prison, plus three mandatory years for the firearm specification. The court journalized its corrected final judgment entries for each defendant on January 12, 2009. Both defendants timely appealed, and this court consolidated their appeals on March 10, 2009 for purposes of record filing.

II. Assignments of Error

{¶13} Jennings assigns nine errors:

ASSIGNMENT OF ERROR #1

THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY OVERRULING HIS OBJECTIONS TO THE STATE'S USE OF ITS PEREMPTORY CHALLENGES TO EXCLUDE RACIAL MINORITIES BY EXCUSING TWO AFRICAN-AMERICAN MEMBERS OF THE VENIRE PANEL, INCLUDING ONE MEMBER ALLEGEDLY BECAUSE OF HER RELIGIOUS AFFILIATION, AND NOT FOLLOWING THE PROCEDURE SET FORTH IN *BATSON V. KENTUCKY* IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSITUTION AND SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION.

ASSIGNMENT OF ERROR #2

APPELLANT'S CONVICTION FOR MURDER UNDER R.C. § 2903.02(B) VIOLATED HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION AS GUARANTEED BY SECTIONS 2 AND 10, ARTICLE I OF THE OHIO CONSTITUTION AND THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

ASSIGNMENT OF ERROR #3

THE TRIAL COURT ERRED IN ENTERING A GUILTY VERDICT ON THE CHARGE OF FELONY MURDER AS R.C. § 2903.02(B) EXPRESSLY PROVIDES THAT THE STATUTE IS INAPPLICABLE WHEN THE APPELLANT CAN BE CHARGED WITH INVOLUNTARY MANSLAUGHTER.

ASSIGNMENT OF ERROR #4

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT OMITTED THE APPELLANT'S REQUESTED ACCOMPLICE INSTRUCTION FROM THE JURY CHARGE THEREBY VIOLATING THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 1 & 16 OF THE OHIO CONSTITUTION.

ASSIGNMENT OF ERROR #5

THE TRIAL COURT PLAINLY ERRED WHEN IT SUBMITTED AN INCORRECT AGGRAVATED ROBBERY INSTRUCTION IN THE JURY CHARGE THEREBY VIOLATING THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 1 & 16 OF THE OHIO CONSTITUTION.

ASSIGNMENT OF ERROR #6

APPELLANT'S CONVICTIONS WERE BOTH AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND WERE NOT SUPPORTED BY THE SUFFICIENCY OF THE EVIDENCE IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 1 & 16 OF THE OHIO CONSTITUTION.

ASSIGNMENT OF ERROR #7

THE TRIAL COURT VIOLATED APPELLANT'S RIGHTS UNDER THE FEDERAL AND STATE CONFRONTATION CLAUSE BY ADMITTING EXTRAJUDICIAL STATEMENTS INCULPATING DEFENDANT MADE BY A CO-DEFENDANT, WHO WAS NOT SUBJECT TO CROSS EXAMINATION BECAUSE HE DID NOT TESTIFY AT TRIAL.

ASSIGNMENT OF ERROR #8

APPELLANT WAS DEPRIVED OF HIS RIGHTS TO A FAIR TRIAL AND DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION AND SECTION 16, ARTICLE I OF THE OHIO CONSTITUTION BY PROSECUTORIAL MISCONDUCT DURING TRIAL.

ASSIGNMENT OF ERROR #9

TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE 6TH [SIC] AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 10 & 16 OF THE OHIO CONSTITUTION.

{¶14} Mock assigns four errors that overlap with Jennings' assignments of error:

> [I.] THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY OVERRULING HIS OBJECTIONS TO THE STATE'S USE OF ITS PEREMPTORY CHALLENGES TO EXCLUDE RACIAL MINORITIES BY EXCUSING TWO AFRICAN-AMERICAN MEMBERS OF THE VENIRE PANEL, INCLUDING ONE MEMBER ALLEGEDLY BECAUSE OF HER RELIGIOUS AFFILIATION, AND NOT FOLLOWING THE PROCEDURE SET FORTH IN BATSON v. KENTUCKY IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION.
>
> [II.] THE VERDICT IS AGAINST THE SUFFICIENCY AND MANIFEST WEIGHT OF THE EVIDENCE.
>
> [III.] THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT OMITTED THE APPELLANT'S REQUESTED ACCOMPLICE INSTRUCTION FROM THE JURY CHARGE THEREBY VIOLATING THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 1 AND 16 OF THE OHIO CONSTITUTION.
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> [IV.] THE TRIAL COURT VIOLATED APPELLANT[']S RIGHTS UNDER THE FEDERAL AND STATE CONFRONTATION CLAUSES BY ADMITTING OUT OF COURT STATEMENTS INCULPATING ONE DEFENDANT MADE BY A CO-DEFENDANT, WHO WAS NOT SUBJECT TO CROSS EXAMINATION BECAUSE HE DID NOT TESTIFY AT TRIAL.

Because each of Mock's assignments of error overlaps with one of Jennings' assignments of error, we address the overlapping assignments of error jointly, followed by the assignments of error unique to Jennings.

III. Mock's First and Jennings' First Assignments of Error – Peremptory Challenge

{¶15} Defendants' first assignments of error argue the trial court erred in overruling Jennings' objection and allowing the prosecution to exercise two of its

peremptory challenges in violation of *Batson v. Kentucky* (1986), 476 U.S. 79, 106 S.Ct. 1712.

{¶16} Ordinarily, the prosecution may exercise a peremptory challenge "for any reason, or no reason at all." *Hernandez v. New York* (1991), 500 U.S. 352, 374, 111 S.Ct. 1859, 1874 (O'Connor, J., concurring). "Under well-established principles of equal protection jurisprudence, however, a peremptory challenge may not be used purposefully to exclude members of a cognizable racial group from jury service solely on the basis of their race." *State v. Powers* (1993), 92 Ohio App.3d 400, 405, citing *Batson* at 84.

{¶17} "A court adjudicates a *Batson* claim in three steps." *State v. Murphy*, 91 Ohio St.3d 516, 528, 2001-Ohio-112. "First, the opponent of the peremptory challenge must make a prima facie case of racial discrimination. Second, if the trial court finds this requirement fulfilled, the proponent of the challenge must provide a racially neutral explanation for the challenge." *State v. Bryan*, 101 Ohio St.3d 272, 287, 2004-Ohio-971, ¶106, citing *Batson* at 96-98. In the third and final step, "the trial court must decide based on all the circumstances, whether the opponent has proved purposeful racial discrimination." Id. at ¶106, citing *Batson* at 98.

{¶18} The prosecution's race-neutral explanation need not rise to the level of a challenge for cause. *State v. Cook* (1992), 65 Ohio St.3d 516, 519, citing *Batson* at 96-98. Instead, the issue at the second step is "the facial validity of the prosecution's explanation. Unless a discriminatory intent is inherent in the prosecution's explanation, the reason offered will be deemed race neutral." *Hernandez v. New York* at 360 (plurality opinion). An appellate court will not reverse a trial court's ruling that finds no

discriminatory intent unless it is clearly erroneous. *Bryan* at ¶106, citing *State v. Hernandez* (1992), 63 Ohio St.3d 577, 583, following *Hernandez v. New York*.

{¶19} At trial, Jennings made two separate *Batson* objections; Mock made no *Batson* objections at trial but piggybacks on appeal Jennings' trial objections to the prosecution's peremptory strikes exercised on potential juror ("Juror A") and potential alternate juror ("Juror B"). As to Juror A, defendants argue the prosecution's racially motivated use of a peremptory challenge violates *Batson*. As to Juror B, however, defendants contend the prosecution's peremptory challenge violates *Batson* because of both racial and religious discrimination.

A. *Batson* and Racial Discrimination

{¶20} In his *Batson* challenges at trial, Jennings' counsel objected to the prosecution's peremptory challenges to Juror A and Juror B. Both defendants on appeal assert the prosecution's stated reasons for exercising those peremptory challenges were merely pretextual, as both women actually were dismissed because they are African-American.

{¶21} To meet the first prong of a *Batson* challenge and establish a prima facie case of purposeful discrimination in the prosecution's exercising its peremptory challenges, a defendant must demonstrate: (1) the prosecution peremptorily challenged members of a cognizable racial group; and (2) the facts and any other relevant circumstances raise an inference that the prosecution used the peremptory challenges to exclude jurors on account of their race. *State v. Ford*, 10th Dist. No. 07AP-803, 2008-Ohio-4373, ¶79, citing *State v. Raglin* (1998), 83 Ohio St.3d 253, 265, citing *State v. Hill* (1995), 73 Ohio St.3d 433. When, however, the prosecution offers a race-neutral

explanation for the peremptory challenges, and the trial court rules on the ultimate question of intentional discrimination, we need not determine the first question in the three-step *Batson* analysis of whether defendant made a prima facie showing of racial discrimination. In that situation, the threshold issue of whether the defendant has made a prima facie showing becomes moot. Id., citing *Hernandez v. New York* at 359; and *State v. Santiago*, 10th Dist. No. 02AP-1094, 2003-Ohio-2877, ¶8.

{¶22} "The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *Purkett v. Elem* (1995), 514 U.S. 765, 768, 115 S.Ct. 1769, 1771. Because the issue of discriminatory intent often turns on the prosecution's credibility, it is "a finding of fact of the sort accorded great deference on appeal." *Hernandez v. New York* at 364-65. When a party properly preserves the issue for appeal with a proper objection, an appellate court reviews the trial court's ruling on the issue of discriminatory intent for clear error. Id. Here, Jennings' counsel objected at trial, so Jennings' *Batson* claim is subject to clear error review.

{¶23} When Jennings raised a *Batson* objection to the prosecution's peremptory challenge to Juror A, the trial court asked the prosecution for a race-neutral explanation. The prosecution cited Juror A's voir dire responses indicating she wanted physical evidence rather than just testimony, her confusion about direct and circumstantial evidence, and her reluctance to believe a witness with a criminal background. The trial court concluded the prosecution stated reasons "other than what would be racial biased." (Voir Dire Tr. 159.) Defendants argued the prosecution's response was merely pretextual because other potential jurors offered similar responses to the same issues but were not subject to a peremptory strike. The trial court rejected the *Batson* challenge and noted

"*Batson* does not remove the opportunity to exercise a peremptory challenge." (Voir Dire Tr. 159.)

{¶24} No inherent discriminatory intent is evident in the prosecution's explanation. See, e.g., *State v. Wright*, 7th Dist. No. 03 MA 112, 2004-Ohio-6802, ¶18, citing *State v. Thomas*, 1st Dist. No. C-010724, 2002-Ohio-7333 (finding prosecution's peremptory challenge because of juror's reluctance to accept circumstantial evidence as proof of guilt was race-neutral). The trial court's decision to overrule Jennings' *Batson* objection for Juror A was not clearly erroneous: the stated reasons were "based on something other than the race of the juror" and did not suggest purposeful racial discrimination. *Hernandez v. New York* at 360.

{¶25} As to Jennings' *Batson* objection to the prosecution's peremptory strike of Juror B, the prosecution responded by citing Juror B's membership in the Vineyard Church. The prosecution said it never kept a potential juror from that church because "[t]hey have a huge criminal outreach program, and they have hung two of my juries." (Voir Dire Tr. 312.) Finding the prosecution's response sufficiently race-neutral, the trial court overruled Jennings' *Batson* objection. See *State v. Gowdy*, 88 Ohio St.3d 387, 394, 2000-Ohio-355 (noting "[r]eligion is often the foundation for an individual's moral values, so religious beliefs can be an important consideration for both sides in seating an impartial jury").

{¶26} In exercising its judgment a trial court may conclude a juror's religion is both a race-neutral and non-pretextual basis for the prosecution's peremptory challenge. Id. Because the stated reasons were based on something other than the juror's race, and Jennings responded with nothing to indicate the challenges were racially motivated, the

trial court's decision to overrule Jennings' *Batson* objection regarding Juror B based on race was not clearly erroneous. *Herandez v. New York* at 360.

{¶27} Although Mock raises a *Batson* challenge on appeal, he did not object at trial to the prosecution's peremptory challenges to either Juror A or Juror B. When a party does not properly preserve the *Batson* issue for appeal with a proper objection, a defendant forfeits all but plain error review of *Batson* claims. Crim.R. 52(B); *State v. Croskey*, 10th Dist. No. 06AP-816, 2007-Ohio-6533, ¶26, n.3 (stating "[a]ppellant's failure to object, notwithstanding her co-defendant's objection, waives all but plain error"); *State v. Ballew* (1996), 76 Ohio St.3d 244, 253 (noting failure to raise *Batson* objection at trial waives all but plain error on appellate review). Mock thus forfeited all but plain error review.

{¶28} For a defect at trial to be rise to the level of plain error, it clearly must have affected the outcome of the case. *State v. Long* (1978), 53 Ohio St.2d 91, paragraph two of the syllabus (stating that an error is plain when it is such that "but for the error, the outcome of the trial clearly would have been otherwise"). Since the trial court's decisions to overrule *Batson* objections for both Juror A and Juror B based on race are not clearly erroneous, those decisions necessarily do not rise to the level of plain error. Thus, defendants' *Batson* arguments addressing racial discrimination are not persuasive.

B. *Batson* and Religious Discrimination

{¶29} Notwithstanding this court's decision regarding their racial discrimination claims, defendants further argue the prosecution's use of a peremptory challenge to remove Juror B as an alternate juror violated *Batson* because it was based on religious discrimination.

{¶30} Mock did not object at trial to Juror B's removal; Jennings' *Batson* challenge to Juror B's removal relied only on charges of racial discrimination. "Objection on one ground does not preserve other, unmentioned grounds." *State v. Wallace*, 10th Dist. No. 08AP-2, 2008-Ohio-5260, ¶25, citing *State v. Davis* (1964), 1 Ohio St.2d 28, 33. The rule is particularly apt in a *Batson* claim, as the prosecution's ability to sufficiently explain the strike is possible only if the specific nature of the objection is clear. *Ballew* at 253 (stating failure to object at trial meant "the prosecutor never had an opportunity to explain his reasons"). Here, even after the prosecution explained its reasons, citing Juror B's church membership, Jennings did not address religious discrimination as the basis of his objection. Thus, both defendants forfeited all but plain error.

{¶31} The state argues no plain error is evident where Juror B, an alternate juror, never deliberated. The Supreme Court of Ohio, however, indicated "alternate status is 'irrelevant' to a *Batson* analysis" as " 'the harm inherent in a discriminatorily chosen jury inures not only to the defendant, but also to the jurors not selected because of their race, and to the integrity of the judicial system as a whole.' " *State v. Were*, 118 Ohio St.3d 448, 458, 2008-Ohio-2762, ¶59, quoting *United States v. Harris* (C.A.6, 1999), 192 F.3d 580, 587-88; but see *State v. Carver*, 2d Dist. No. 21328, 2008-Ohio-4631, ¶67, appeal not allowed, 120 Ohio St.3d 1507, 2009-Ohio-361 (concluding the quoted language from *Were* to be non-binding dictum and holding a *Batson* error in the removal of an alternate juror is harmless if no alternate juror deliberates in the case). Even under *Were,* no plain error is apparent.

{¶32} The United States Supreme Court has yet to extend *Batson* to claims of religious discrimination. *Davis v. Minnesota* (1994), 511 U.S. 1115, 114 S.Ct. 2120, cert.

denied. Appellate courts disagree on whether *Batson* applies to religious discrimination. Cf., e.g., *United States v. Brown* (C.A.2, 2003), 352 F.3d 654, 668-69 (applying *Batson* to discrimination based on religious affiliation, but not applying it to religious activities) and *State v. Davis* (Minn.1993), 504 N.W.2d 767, syllabus (stating *Batson* "should not be extended to peremptory strikes based on religious affiliation").

{¶33} More importantly, no Ohio court has applied *Batson* to a claim of religious discrimination. To the contrary, the Ohio Supreme Court suggested, without so holding, that *Batson* permits removal based on a prospective juror's religious beliefs. *Gowdy* at 394 (observing the prosecution's explanation that cited the juror's religious beliefs "was both race-neutral and non-pretextual"). Similarly, *State v. Lundgren* (1993), 11th Dist. No. 90-L-140 ("*Lundgren I*"), found no plain error in the prosecution's removing a Mormon juror; the court emphasized the appellant could not cite any authority to support the claim "that it is improper to use a peremptory challenge to excuse a juror on the basis of religion." Id. Concluding *Batson* is limited to claims of racial discrimination, *Lundgren I* stated the court could not "literally analogize the exclusion of blacks from a jury to the exclusion of religious groups for these purposes." Id. The Ohio Supreme Court affirmed because the defendant failed to preserve the issue for appeal. *State v. Lundgren* (1995), 73 Ohio St.3d 474, 484-85 ("*Lundgren II*").

{¶34} Since defendants did not object at trial based on religious discrimination grounds, the prosecution was not able to explain more fully the reasons for exercising a peremptory strike. See, e.g., *Brown* at 670 (observing that when the lack of a proper objection at trial prevents the trial court from determining whether the prosecution's reasons were sufficiently religion-neutral, "the basis for the challenge is ambiguous

enough so that any error the judge might have committed in permitting the strike was not 'obvious' or 'egregious' "). Moreover, even if *Batson* applies to claims of religious discrimination in the exercise of a peremptory challenge against a potential alternate juror who never deliberated in the case, no plain error exists here. *Lundgren II*.

{¶35} We therefore overrule Jennings' first and Mock's first assignments of error.

IV. Mock's Second and Jennings' Sixth Assignments of Error – Sufficiency and Manifest Weight of the Evidence

{¶36} Jennings' sixth and Mock's second assignments of error assert sufficient evidence and the manifest weight of the evidence do not support their convictions.

A. Sufficiency of the Evidence

{¶37} Whether the evidence is legally sufficient to sustain a verdict is a question of law. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. Sufficiency is a test of adequacy. Id. We construe the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus; *State v. Conley* (Dec. 16, 1993), 10th Dist. No. 93AP-387.

{¶38} The jury found defendants guilty of murder and aggravated robbery, along with firearm specifications for each. R.C. 2903.02(B) proscribes murder, stating "[n]o person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree." In this case, the predicate first-degree felony of violence underlying the murder charge is aggravated robbery, which R.C. 2911.01(A) defines by stating that "[n]o person, in attempting or committing a theft offense * * * or in fleeing immediately after the attempt

or offense, shall have or use a deadly weapon" in any of the ways proscribed in R.C. 2911.01(A)(1), (2) or (3). The firearm specification is not a separate offense but a sentencing provision.

{¶39} Mock argues his murder and aggravated robbery convictions turned on identification. In that regard, the prosecution introduced testimony from Victor to identify Mock as the person who entered Hunter's home in an effort to steal marijuana and who fired shots at Hunter. The prosecution also introduced testimony from Cawthon identifying Mock as the man who confessed to Cawthon his involvement in Hunter's death. Mock argues the credibility issues inherent in both Victor's and Cawthon's criminal records, as well as the fact that Victor was never charged with a crime for his involvement in Hunter's death, suggest their testimony is not sufficient to support his conviction.

{¶40} Mock bases his argument on what he deems to be the lack of credibility in the testimony of Victor and Cawthon. Credibility-based arguments, however, are inappropriate in a challenge to the sufficiency of the evidence. "In determining whether a conviction is based on sufficient evidence, we do not assess whether the evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *State v. Smith*, 10th Dist. No. 08AP-736, 2009-Ohio-2166, ¶26, citing *Jenks* at paragraph two of the syllabus, and *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶79. Cawthon's testimony, if believed, is sufficient to identify Mock as the man who confessed to the crimes. Further, Victor's testimony alone, if believed, is sufficient to identify defendants and prove all essential elements of murder and aggravated robbery.

{¶41} Jennings contends the evidence against him was insufficient to prove aggravated robbery. Specifically, Jennings argues both that he did not personally inflict

any harm on Hunter since he was on the porch when Mock shot Hunter, and that no evidence indicated he brandished a gun during the offense. See R.C. 2911.01(A)(1) and (3). Jennings' argument, however, ignores his guilt for aiding and abetting. R.C. 2923.03(A)(2). In order to support a conviction under R.C. 2923.03(A)(2), the evidence not only "must show that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime," but "that the defendant shared the criminal intent of the principal. Such intent may be inferred from the circumstances surrounding the crime." *State v. Johnson*, 93 Ohio St.3d 240, 2001-Ohio-1336, syllabus. Victor's testimony, if believed, was sufficient to prove Jennings aided and abetted Mock in the aggravated robbery of Hunter. Jennings expressed to Victor his intent to rob Hunter and stated Mock shared that intent. Although Jennings never entered Hunter's house, the state's evidence reveals Jennings carried his own unloaded gun and accompanied Mock to the front porch of the victim's house.

{¶42} Despite Victor's testimony, Jennings contends the jury did not render a verdict for complicity and, absent such a finding, the evidence is insufficient for the reasons he argued. Whether the jury's verdict refers to Jennings as an aider and abettor is immaterial because "[a] charge of complicity may be stated in terms of this section, or in terms of the principal offense." R.C. 2923.03(F).

{¶43} Jennings further asserts the evidence is insufficient to support the firearm specification because the prosecution presented no evidence that Hunter ever saw Jennings' weapon or that Jennings ever brandished a weapon.

{¶44} In *State v. Morris*, 2d Dist. No. 07-CA-112, 2008-Ohio-4744, the Second District addressed the same issue Jennings raises. There, Morris was indicted on one

count of aggravated burglary, with a firearm specification. The language of the specification stated that the grand jury found and specified Morris not only "had a firearm on or about the offender's person or under the offender's control while committing the offense" but "displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense." Id. at ¶7.

{¶45} The jury returned a verdict adverse to Morris, and the trial court imposed a three-year firearm specification. On appeal, the court concluded the record had insufficient evidence to convict Morris of a three-year firearm specification because, while the record contained evidence he possessed the firearm, no evidence indicated he brandished, used, displayed or indicated possession of a gun during the offense. The appellate court reversed and remanded the matter to the trial court. On remand, the trial court filed an amended judgment entry of conviction, sentencing Morris on a one-year firearm specification since sufficient evidence established defendant possessed a firearm "under the terms of Revised Code section 2941.141." Id. at ¶11.

{¶46} On appeal from the revised sentence, Morris contended "specifications are not criminal offenses," and "a one-year firearm-specification sentence could not be imposed as a 'lesser-included offense' of a three-year firearm specification." Id. at ¶15. Morris thus argued that, because R.C. 2941.141 was omitted from the indictment, he could not be sentenced on the one-year specification. Id.

{¶47} Noting R.C. 2941.141 requires certain language in the indictment, the Second District found the specification using the language from R.C. 2941.145 "substantially complies with the * * * form" from R.C. 2941.141. Id. at ¶21. Moreover, the court observed, the verdict form separated the two issues, allowing the jury first to

consider whether defendant had a firearm on his person or under his control and then separately considering whether Morris used, brandished, displayed or indicated possession of the firearm during the offense. Id. at ¶22.

{¶48} The Second District concluded that "[w]hen the grand jury found probable cause to believe that [defendant] 'had a firearm on or about the [his] person or under [his] control while committing the offense and displayed the firearm, brandished the firearm, indicated that [he] possessed the firearm, or used it to facilitate the offense,' " it "necessarily found probable cause to believe the lesser state of facts required for the one-year firearm specification that [defendant] 'had a firearm on or about the [his] person or under [his] control while committing the offense.' " Id. at ¶27. As a result, the court determined the specification in the indictment did not mislead or prejudice Morris in any way, as the indictment notified defendant of a specification involving his possession or control of a weapon, and, consistent with that specification, the jury found defendant was in possession or control of a weapon while committing aggravated burglary. Id. at ¶28.

{¶49} Here, Jennings' indictment contained the same R.C. 2941.145 language noted in *Morris*, and, as in *Morris*, the jury verdict form required the jury separately to find Jennings possessed a gun, as under R.C. 2941.141 from the element requiring Jennings to brandish, display, use or indicate possession of a gun during the offense under R.C. 2941.145. Accordingly, we reach the same conclusion as did *Morris*: defendant was neither misled nor prejudiced. The jury found he possessed a gun, the evidence supports that finding, and the trial court sentenced him only for possession. Jennings suffered no prejudice from any error that occurred.

{¶50} Jennings next contends insufficient evidence supports his murder conviction because the state did not present evidence showing either the requisite scienter or causation. Felony murder under R.C. 2903.02(B) "does not require the state to prove any purpose or specific intent to cause death. The mens rea element for felony murder under R.C. 2903.02(B) is satisfied when the state proves the intent required for the underlying felony." *State v. Ford*, 10th Dist. No. 07AP-803, 2008-Ohio-4373, ¶27, citing *State v. Walters*, 10th Dist. No. 06AP-693, 2007-Ohio-5554, ¶61, citing *State v. Hayden* (July 14, 2000), 11th Dist. No. 99-L-37. Having presented sufficient evidence to prove aggravated robbery, the state likewise presented sufficient evidence to prove the necessary scienter for felony murder.

{¶51} As to causation, Jennings' contention that Mock was the shooter makes Jennings no less culpable under R.C. 2903.02(B). The statute "does not provide that the defendant or an accomplice must be the immediate cause of death." *Ford* at ¶32. Rather, the felony murder statute contemplates a proximate cause theory, and Hunter's death was a reasonably foreseeable consequence of defendants' aggravated robbery offense regardless of which of the two defendants pulled the trigger. Id., citing *State v. Dixon*, 2d Dist. No. 18582, 2002-Ohio-541. Even if R.C. 2903.02(B) requires the offender to be the immediate cause of death, Jennings still would be guilty as the shooter due to his complicity under R.C. 2923.03(A)(2).

{¶52} Accordingly, sufficient evidence supports defendants' convictions for murder and aggravated robbery, as well as the accompanying firearm specifications.

B. Manifest Weight of the Evidence

{¶53} When presented with a manifest weight argument, we engage in a limited weighing of the evidence to determine whether sufficient competent, credible evidence supports the jury's verdict to permit reasonable minds to find guilt beyond a reasonable doubt. *State v. Conley* (Dec. 16, 1993), 10th Dist. No. 93AP-387; *State v. Thompkins* (1997), 78 Ohio St. 380, 387 (noting that "[w]hen a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony"). Determinations of credibility and weight of the testimony remain within the province of the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. The jury thus may take note of the inconsistencies and resolve them accordingly, "believ[ing] all, part or none of a witness's testimony." *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶21, citing *State v. Antill* (1964), 176 Ohio St. 61, 67.

{¶54} Defendants contend the jury "lost its way" in assessing Victor's and Cawthon's credibility because both witnesses had something personal to gain from their testimony. See *Thompkins* at 387 (noting the role of the appellate court in a manifest weight review is to determine whether the trier of fact "clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered"). Specifically, defendants point to the state's never charging Victor for his involvement in Hunter's death; they suggest the state did so in exchange for Victor's testimony. Defendants also highlight Victor's admission that he lied to police on several occasions, as well as Cawthon's acknowledgment that he spoke to police hoping to

collect Crime Stoppers money and he requested, but never received, help from police in getting out of jail in exchange for his testimony.

{¶55} Although defendants' credibility contentions are more appropriate here rather than in their arguments about the sufficiency of the evidence, even a manifest-weight review requires the appellate court to "bear in mind the trier of fact's superior, first-hand perspective in judging the demeanor and credibility of witnesses." *State v. Mickens*, 10th Dist. No. 08AP-626, 2009-Ohio-1973, ¶30, *DeHass* at paragraph one of the syllabus. Accordingly, the fact finder's determination of the witnesses' credibility is entitled to great deference. *State v. Covington*, 10th Dist. No. 02AP-245, 2002-Ohio-7037, ¶28.

{¶56} Here, the jury as trier of fact was in the best position to observe the demeanor of Victor and Cawthon. Although Victor admitted to lying previously to police, the jury was able to weigh that factor and apparently concluded Victor's trial testimony was credible. The jury was not prevented from believing Victor "simply because the witness may have been, to some degree, uncooperative with the police." *State v. Darthard*, 10th Dist No. 07AP-897, 2008-Ohio-2425, ¶14. Although defendants also argue that inconsistencies in Victor's testimony and in his statements to police detract from his credibility, "[i]t is the province of the jury to determine where the truth probably lies from conflicting statements, not only of different witnesses but by the same witness." *State v. Haynes*, 10th Dist. No. 03AP-1134, 2005-Ohio-256, ¶24, quoting *State v. Lakes* (1964), 120 Ohio App. 213, 217. As for defendants' allegations that Victor and Cawthon may have benefited from providing testimony for the prosecution, the jury was free to assess their credibility in light of any consideration they received from the state. *State v. Bliss*, 10th Dist. No. 04AP-216, 2005-Ohio-3987, ¶26.

{¶57} Because we cannot say the jury lost its way in weighing the credibility of the witnesses, its verdict is not against the manifest weight of the evidence. Given sufficient evidence and the manifest weight of the evidence supporting the jury's verdicts, we overrule Mock's second and Jennings' sixth assignments of error.

V. Mock's Third and Jennings' Fourth Assignments of Error – Accomplice Instruction

{¶58} Defendants next assert that, in light of Victor's testimony, the trial court erred in refusing to instruct the jury about an accomplice's testimony. At trial, Jennings requested the trial court include the accomplice instruction found in 4 O.J.I. § 405.41; Mock did not join the request.

{¶59} A trial court is responsible for providing all jury instructions that are relevant and necessary for the jury to weigh the evidence and determine the facts. *State v. Moody* (Mar. 13, 2001), 10th Dist. No. 98AP-1371, citing *State v. Comen* (1990), 50 Ohio St.3d 206, paragraph two of the syllabus. The trial court's instructions should outline the issues, state the applicable principles of law, and clarify the jury's role in the case. *Moody*, citing *Bahm v. Pittsburgh & Lake Erie R.R. Co*. (1966), 6 Ohio St.2d 192. "A jury instruction is proper when it adequately informs the jury of the law." *Moody*, citing *Linden v. Bates Truck Lines, Inc*. (1982), 4 Ohio App.3d 178. We review the trial court's refusal to give a requested instruction to determine if the decision constituted an abuse of discretion under the facts and circumstances of the case. *State v. Smith* (Apr. 2, 2002), 10th Dist. No. 01AP-848, citing *State v. Wolons* (1989), 44 Ohio St.3d 64, 68. Mock failed to join Jennings' request for the accomplice instruction, so Mock forfeited all but plain error. Crim.R. 52(B); *State v. Woodson*, 10th Dist. No. 03AP-376, 2004-Ohio-5713, ¶16.

{¶60} The accomplice instruction Jennings requested provides two alternatives if an accomplice testifies. The first alternative, which Jennings specifically requested, defines the accomplice as either "another person who pleaded guilty to the same crime charged in this case" or "another person who is accused of the same crime charged in this case." 4 O.J.I. § 405.41. The second alternative, which parrots the language of R.C. 2923.03(D), requires the trial court to instruct the jury that "the admitted or claimed complicity of a witness may affect his credibility and make his testimony subject to grave suspicion, and require that it be weighed with great caution."

{¶61} Here, defendants argue that because Victor was an accomplice to Hunter's robbery and murder, the accomplice instruction was warranted. Defendants point to Victor's testimony in which he describes himself and defendants as they approached Hunter's home, discussing their plan with the collective "we." (Tr. 47-48.) Even when they were standing directly outside Hunter's house, Victor included his actions with those of the defendants when he testified that "we start going into how we was gonna do it." (Tr. 50.) Although Victor testified he abandoned the plan before defendants went onto Hunter's porch, defendants point to Victor's testimony that he met defendants again after fleeing the scene. Defendants argue such facts suggest Victor is an unindicted co-conspirator whose testimony warrants the accomplice instruction. They contend the trial court's decision not to so instruct the jury was an abuse of discretion and plain error.

{¶62} In construing a prior version of R.C. 2923.03(D), the Supreme Court of Ohio noted "accomplice" commonly means one "who *is guilty* of complicity in crime charged." (Emphasis sic.) *State v. Wickline* (1990), 50 Ohio St.3d 114, 117. To bring someone within the meaning of accomplice, the Supreme Court reasoned, the state must first indict

the alleged accomplice because "a person who *is guilty* of complicity must first be *found* guilty of complicity by either a judge or a jury." (Emphasis sic.) Id. at 118. At the very least, therefore, "an 'accomplice' must be a person indicted for the crime of complicity." Id.

{¶63} This court previously applied that same definition of "accomplice" to the current version of R.C. 2923.03(D), concluding "[a]n instruction under R.C. 2923.03(D) 'is not required when the witness is not charged with complicity as a result of involvement with the defendant's criminal activities.' " *State v. Olverson*, 10th Dist. No. 02AP-554, 2003-Ohio-1274, ¶54, quoting *State v. Sillett*, 12th Dist. No. CA2000-10-205, 2002-Ohio-2596, ¶14; *State v. Perez,* ___ Ohio St.3d ___, 2009-Ohio-6179. See also, e.g., *State v. Howard*, 5th Dist. No. 06CAA100075, 2007-Ohio-3669, ¶62 (following *Sillett* and finding the trial court did not err in refusing to give the requested accomplice instruction when the witness "was not charged in the indictment as an accomplice"); *State v. Perry*, 157 Ohio App.3d 443, 2004-Ohio-3020, ¶16 (stating "unless a witness has been indicted, trial courts are not required to give the accomplice instruction set forth in R.C. 2923.03(D)"); *State v. Carroll*, 12th Dist. No. CA2007-02-030, 2007-Ohio-7075, ¶147 (declining to depart from the *Wickline* requirement that, in order to require the accomplice instruction, the alleged accomplice must be a person indicted for the crime of complicity).

{¶64} Here, the state never charged Victor with complicity or any other crime for his involvement in defendants' criminal activities. Under such circumstances, the trial court did not abuse its discretion in refusing to give the requested accomplice instruction. Defendants nonetheless contend the trial court's refusal to give the accomplice instruction violated their due process rights. Relying on *Hopper v. Evans* (1982), 456 U.S. 605, 102 S.Ct. 2049, defendants assert due process requires the trial court to give an instruction if

the evidence supports it. Id. at 611, 2052. Defendants argue that because the state could have indicted Victor for his involvement with Hunter's death, due process requires the trial court to instruct the jury regarding accomplices.

{¶65} In *Hopper*, which dealt with jury instructions for lesser-included offenses, the Supreme Court stated that due process requires an instruction on lesser included offenses to be "given *only* when the evidence warrants such an instruction." (Emphasis sic.) Id. *Hopper* thus fails to support defendants' contentions, because the evidence must reveal the witness at the very least to be a person indicted for his or her conduct in relation to the defendant's criminal activity to invoke the accomplice instruction under R.C. 2923.03(D).

{¶66} Moreover, the possibility that a witness "could" have been indicted as an accomplice does not require the trial court to instruct on accomplice testimony. *Sillet* at ¶19. Even if such an instruction may be appropriate when evidence is "presented to show that [the witness] received any type of favorable treatment in exchange for testifying against [the defendant]," id. at ¶20, no such evidence was presented here. Because the state in its discretion never indicted Victor, and Victor testified he received no consideration in exchange for his testimony, neither R.C. 2923.03(D) nor due process required the trial court to instruct the jury on the potential problems with accomplice testimony. The trial court, therefore, did not abuse its discretion in denying Jennings' request for such an instruction.

{¶67} Much less can Mock demonstrate plain error. To determine whether a trial court's failure to give the accomplice instruction constitutes plain error, Ohio courts look to three factors: (1) whether other evidence at trial corroborated the alleged accomplice's

testimony; (2) whether the jury was aware from the alleged accomplice's testimony that he benefited from agreeing to testify against the defendant; and/or (3) whether the court instructed the jury generally regarding its duty to evaluate the credibility of the witnesses and its province to determine what testimony is worthy of belief. *State v. Woodson*, 10th Dist. No. 03AP-736, 2004-Ohio-5713, ¶18. (Citations omitted.) "[I]f the first factor and one other factor are present, the absence of the accomplice instruction will not affect the outcome of the case." Id.

{¶68} Here, other trial evidence corroborated much of Victor's testimony. For example, Nettles identified Jennings as one of the men on her porch just before the gunshots, Cawthon identified Mock as the man who confessed to the crimes, and forensic evidence indicated the bullets that killed Hunter came from a 9-millimeter firearm, the type of gun Victor testified Mock had with him that night. Next, the jury was aware, from Victor's own testimony, that he was not offered any consideration from the state in exchange for his testimony. Defendants urge that the state's refraining from indicting Victor is in itself consideration, but both Victor and Detective Young testified Victor received no guarantee Victor would not be charged with a crime. Finally, the court instructed the jury generally regarding witness credibility and what testimony is worthy of belief, providing the jury with a variety of factors to consider, including "interest and bias, if any" of the witnesses. (Tr. 521.) Informing the jurors that they may "believe all, part, or none of the testimony of any witness," the trial court further instructed the jury it was "to determine what testimony is worthy of belief and what testimony is not worthy of belief." (Tr. 521.) Because all three requirements of the three-pronged test are met here, the trial court's failure to give the accomplice instruction does not constitute plain error. *Perez*.

{¶69} For the reasons stated, we overrule Mock's third and Jennings' fourth assignments of error.

VI. Mock's Fourth and Jennings' Seventh Assignments of Error – Confrontation Clause Challenge

{¶70} Defendants next assert the trial court violated defendants' constitutional right under the United States and Ohio Constitutions to confront witnesses when it admitted a non-testifying co-defendant's extrajudicial statements. Specifically, defendants contend the trial court violated *Bruton v. United States* (1968), 391 U.S. 123, 88 S.Ct. 1620, in allowing Cawthon's testimony regarding both defendants' out-of-court statements when neither testified nor was subject to cross-examination. At the very least, defendants argue, the trial court should have ordered defendants' trials to be severed.

{¶71} In *Bruton*, the United States Supreme Court held a trial court deprives a defendant of his or her Sixth Amendment right to confrontation "when a facially incriminating extrajudicial statement of a nontestifying co-defendant is introduced at their joint trial, despite a trial court's instruction to the jury to consider the statement only against the co-defendant." *State v. Wilkerson*, 10th Dist. No. 01AP-1127, 2002-Ohio-5416, ¶43. Where, however, "the contested statement is not incriminating to a defendant on its face, but is only so when linked with other evidence at trial, a trial court's limiting instruction is enough to restrain the jury from considering the statement for a purpose that would violate the defendant's right to confrontation." Id., citing *State v. Laird* (1989), 65 Ohio App.3d 113, 115-17, following *Richardson v. Marsh* (1987), 481 U.S. 200, 107 S.Ct. 1702. Even where a trial court violates the *Bruton* rule, "such '[a] violation of an accused's right to confrontation and cross-examination is not prejudicial' " where sufficient

independent evidence of an accused's guilt renders "improperly admitted statements harmless beyond a reasonable doubt." Id., citing *State v. Moritz* (1980), 63 Ohio St.2d 150, paragraph two of the syllabus. See also *Schneble v. Florida* (1972), 405 U.S. 427, 430, 92 S.Ct. 1056, 1059.

{¶72} Defendants base their *Bruton* arguments on different statements made during Cawthon's testimony. We separately analyze those statements to determine whether they are facially incriminating.

A. Jennings' *Bruton* Argument

{¶73} Jennings focuses on the portion of Cawthon's testimony restating parts of Mock's conversation with Cawthon that implicate Jennings. Specifically, Cawthon testified Mock told him "[t]hey had went to pull a lick. And during the time of that shots was fired, a shot was fired. Kevin, Little Kev ran. And that's why he was mad at Little Kev pretty much." (Tr. 296-97.) Cawthon further testified Mock told him, "Kevin run off first. Little Kev run off first. And then Face run off later." (Tr. 298.) Jennings argues Mock's out-of-court statements implicate Jennings and violate his confrontation clause rights because Mock, who did not testify, was not subject to cross-examination.

{¶74} Before the state called Cawthon to testify, Jennings noted his concern that Cawthon's testimony would create a *Bruton* issue. (Tr. 206.) Jennings twice asked the court either to exclude the challenged portion of Cawthon's testimony or give a limiting instruction to the jury. Initially, the trial court instructed the prosecution not to ask Cawthon "those questions" which might create a *Bruton* issue. (Tr. 208.) Later, however, the trial court reconsidered its initial ruling and decided the prosecution could address Cawthon's testimony regarding out-of-court statements the defendants made, as the court would

provide the jury with a limiting instruction. After reading the proposed limiting instruction to counsel for both defendants, the trial court specifically invited comments from counsel. Jennings' attorney did not object to the court's new ruling. The court ultimately twice instructed the jury that one defendant's statement made outside the presence of the other defendant is admissible only against the declarant. (Tr. 285, 524.)

{¶75} To the extent Jennings contends the trial court should have precluded Cawthon's testimony, the issue Jennings raises is one of invited error. See, e.g., *State v. Bogovich*, 10th Dist. No. 07AP-774, 2008-Ohio-3100, ¶10 (explaining invited error precludes a claim of reversible plain error); *State v. Doss*, 8th Dist. No. 84433, 2005-Ohio-775, ¶5. "Under the invited-error doctrine, '[a] party will not be permitted to take advantage of an error which he himself invited or induced.' " *State v. Bey*, 85 Ohio St.3d 487, 493, 1999-Ohio-283, quoting *Hal Artz Lincoln-Mercury, Inc. v. Ford Motor Co*. (1986), 28 Ohio St.3d 20, paragraph one of the syllabus, following *Lester v. Leuck* (1943), 142 Ohio St. 91, paragraph one of the syllabus.

{¶76} Here, Jennings expressly requested either the exclusion of Mock's out-of-court statements or the inclusion of a limiting instruction. The trial court chose the latter. After the court read the proposed limiting instruction, it invited Jennings to comment; Jennings did not take issue with any part of the instruction. The trial court's failure to preclude Cawthon's testimony and instead give the limiting instruction Jennings requested forms the basis for his *Bruton* argument on appeal. "This is precisely the situation the invited error doctrine seeks to avert." *Doss* at ¶7, quoting *United States v. Jernigan* (C.A.7, 2003), 341 F.3d 1273, 1290 (holding a criminal defendant "may not make an affirmative, apparently strategic decision at trial" regarding its underlying *Bruton*

claim, "then complain on appeal that the result of that decision constitutes reversible error").

{¶77} To the extent Jennings on appeal contends the limiting instruction was deficient, we apply a plain error analysis. Jennings, however, does not specify on appeal what is lacking in the instruction the trial court provided to the jury at his request. Instead he contends unsuccessfully the trial court should not have allowed Cawthon's testimony. Accordingly, Jennings' *Bruton* argument is unpersuasive.

B. Mock's *Bruton* Argument

{¶78} Mock, on the other hand, opposes the portion of Cawthon's testimony regarding statements Jennings made to Cawthon that implicate Mock. Cawthon testified Jennings told him "that Face was upset with him for something that went on between them two and that he didn't want to talk to me about that." (Tr. 303.) Mock argues Jennings' out-of-court statement not only implicates Mock in the robbery and murder but violates Mock's confrontation rights because Jennings did not testify and thus was not subject to cross-examination. Mock did not object to any potential *Bruton* issue, thus forfeiting all but plain error. *Jalowiec* at 225-26; see also Crim.R. 52(B); *Croskey* at ¶26, n.3 (stating "[a]ppellant's failure to object, notwithstanding her co-defendant's objection, waives all but plain error").

{¶79} The *Bruton* analysis requires an appellate court to consider whether the contested out-of-court statement is incriminating to the defendant on its face. *Wilkerson* at ¶43. Jennings' out-of-court statement to Cawthon stated Mock was upset with Jennings about something, but Cawthon's testimony did not elaborate on what that "something" was. Taken in isolation, the statement on its face does not incriminate Mock. Only when

the statement is considered in conjunction with the whole of Cawthon's testimony and other evidence introduced at trial does it incriminate Mock. In that situation, "a trial court's limiting instruction is enough to restrain the jury from considering the statement for a purpose that would violate the defendant's right to confrontation." Id., citing *Laird*, following *Richardson*.

{¶80} The trial court here issued a limiting instruction before Cawthon began his testimony; the court then reiterated that limiting instruction in its final charge to the jury before deliberations. Because Jennings' out-of-court statement on its face was not incriminating to Mock and the court issued a proper limiting instruction, no plain error occurred.

C. Severance Argument

{¶81} Defendants alternatively argue the trial court should have severed the trial after the trial court allowed Cawthon's testimony, including the contested out-of-court statements.

{¶82} As a general rule, the law favors joinder because it " 'conserves judicial and prosecutorial time, lessens the not inconsiderable expenses of multiple trials, diminishes inconvenience to witnesses, and minimizes the possibility of incongruous results in successive trials before different juries.' " *State v. Walters*, 10th Dist. No. 06AP-693, 2007-Ohio-5554, ¶21, citing *State v. Daniels* (1993), 92 Ohio App.3d 473, quoting *State v. Thomas* (1980), 61 Ohio St.2d 223, 225. Nonetheless, a defendant may move for severance pursuant to Crim.R. 14. "If it appears that a defendant or the state is prejudiced by joinder of * * * defendants * * * for trial * * * the court shall order an election or separate

trial of counts, grant a severance of defendants, or provide such other relief as justice requires." Crim.R. 14.

{¶83} The record lacks evidence that defendants moved for severance pursuant to Crim.R. 14. Defendants thus forfeited all but plain error. *State v. Burks*, 10th Dist. No. 07AP-553, 2008-Ohio-2463, ¶50, citing *State v. Williams*, 10th Dist. No. 02AP-730, 2003-Ohio-5204, ¶29 (noting the failure to make or renew an objection to the trial court's not severing the trial waives all but plain error); Crim.R. 52(B).

{¶84} To demonstrate a trial court's error in denying severance, a defendant must establish (1) that his rights were prejudiced, (2) "that at the time of the motion to sever he provided the trial court with sufficient information so that it could weigh the considerations favoring joinder against the defendant's right to a fair trial," and (3) "that given the information provided to the court, it abused its discretion in refusing to separate the charges for trial." *Walters* at ¶22, citing *State v. Schaim* (1992), 65 Ohio St.3d 51, 59, citing *State v. Torres* (1981), 66 Ohio St.2d 340, syllabus.

{¶85} Here, defendants never moved for severance, so they did not provide the trial court with sufficient information to weigh considerations in favor of joinder against defendants' right to a fair trial. As such, no error, much less plain error, occurred. Accordingly, we overrule Mock's fourth and Jennings' seventh assignments of error.

VII. Jennings' Second and Third Assignments of Error – Felony Murder Statute

{¶86} Jennings' second assignment of error claims the felony murder statute, R.C. 2903.02(B), violates due process and equal protection principles. Jennings' third assignment of error asserts the state erroneously charged him with felony murder under R.C. 2903.02(B) when the state should have charged him with involuntary manslaughter.

As both assignments of error involve the terms and application of R.C. 2903.02(B), we address them together.

{¶87} Initially, we note Jennings raised no constitutional challenge to the statute in the trial court. Jennings therefore forfeited all but plain error. *Walters* at ¶57 (stating a challenge to R.C. 2903.02(B) which defendant did not raise at trial is subject to plain-error review).

A. Due Process and R.C. 2903.02(B)

{¶88} Jennings argues that because R.C. 2903.02(B) does not require proof of purpose to kill, it is unconstitutional both on its face and as applied. Relying on common law principles, Jennings argues due process requires the state to prove the intent to kill before convicting a defendant of murder.

{¶89} In Ohio, however, statutes define crimes, not common law. *Akron v. Rowland*, 67 Ohio St.3d 374, 383, 1993-Ohio-222, n.4, citing R.C. 2901.03(A). "The mens rea element for felony murder under R.C. 2903.02(B) is satisfied when the state proves the intent required for the underlying felony." *State v. Ford*, 10th Dist. No. 07AP-803, 2008-Ohio-4373, ¶27, citing *Walters* at ¶61, citing *State v. Hayden* (July 14, 2000), 11th Dist. No. 99-L-037. "[T]he General Assembly has chosen to define felony murder in this manner, and the General Assembly is presumed to know the consequences of its legislation." *State v. Miller*, 96 Ohio St.3d 384, 2002-Ohio-4931, ¶34. Given that predicate, other courts have rejected the argument that the omission in R.C. 2903.02(B) of a purpose-to-kill element violates due process. See, e.g., *State v. Jones*, 8th Dist. No. 80737, 2002-Ohio-6045, ¶128-29 (agreeing with other cases that felony murder statute does not violate due process); *State v. Bowles* (May 11, 2001), 11th Dist. No. 99-L-075;

State v. Luttrell (Nov. 2, 2001), 2d Dist. No. 18496; *State v. Smathers* (Dec. 20, 2000), 9th Dist. No. 19945.

{¶90} Here, the underlying felony is aggravated robbery, in pertinent part defined in R.C. 2911.01 as "attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code." The Second District Court of Appeals concluded the requisite mens rea for aggravated robbery is "knowingly." See, e.g., *State v. Williamson*, 2d Dist. No. 22878, 2008-Ohio-6246, ¶20 (concluding the mental element of "knowingly" from the theft offense set the mens rea for aggravated robbery); *State v. Manns*, 169 Ohio App.3d 687, 2006-Ohio-5802, ¶14. The Ohio Supreme Court upheld a conviction for felony murder when the underlying felony contained "knowingly" as the mental element. *Miller*, syllabus (supporting conviction of defendant for felony murder when "the defendant knowingly caused physical harm to the victim" pursuant to the underlying offense of felonious assault). Because the prosecution presented sufficient evidence at trial to find all requisite elements of Jennings' underlying aggravated robbery conviction, including that Jennings acted knowingly, Jennings' conviction for felony murder under R.C. 2903.02(B) does not violate his constitutional guarantee to due process.

B. Equal Protection, Involuntary Manslaughter, and R.C. 2903.02(B)

{¶91} Jennings also asserts R.C. 2903.02(B) violates equal protection by allowing the prosecution undue discretion in deciding whether to charge a defendant under R.C 2903.02(B), the felony murder statute, or R.C. 2903.04(A), involuntary manslaughter. Jennings contends the two statutes prohibit identical activity, yet R.C. 2903.02(B) subjects offenders to heightened penalties. See *State v. Wilson* (1979), 58 Ohio St.2d 52, 56 (holding where two statutes "prohibit identical activity, require identical proof, and yet

impose different penalties, then sentencing a person under the statute with the higher penalty violates the Equal Protection Clause"). Jennings contends that because he could have been charged with involuntary manslaughter, the trial court erred in charging him under the felony murder statute.

{¶92} Contrary to Jennings' argument, "R.C. 2903.02(B) and 2903.04(A) do not prohibit identical activity and require identical proof." *Ford* at ¶29. Quoting from *Dixon*, this court stated that "[c]ausing another's death as a proximate result of committing *any* felony, which is sufficient to prove involuntary manslaughter, is not always or necessarily sufficient to prove felony murder." (Emphasis sic.) *Ford* at ¶29. Rather, "to prove felony murder the State is required to prove more: that the underlying felony is an offense of violence, defined in R.C. 2901.01(A)(9), that is a felony of the first or second degree, and not a violation of R.C. 2903.03 or 2902.04." Id. Thus, "[p]roof of involuntary manslaughter is not sufficient to prove felony murder except in those particular cases where an additional requirement is met: the underlying felony is an offense of violence that is a felony of the first or second degree." Id.

{¶93} The test, then, is whether the state bears the burden of proving any additional element if the offender is charged with the elevated crime. *Wilson* at 55. "Because felony murder requires proof of an additional requirement, there is a rational basis for assigning a different, and harsher, penalty to the offense of felony murder." *Ford* at ¶29.

{¶94} Also without merit is Jennings' contention that the prosecution's discretion to charge some offenders under either R.C. 2903.02(B) or 2903.04(A) violates equal protection. "When an act violates more than one criminal statute, the Government may

prosecute under either so long as it does not discriminate against any class of defendants." *United States v. Batchelder* (1979), 442 U.S. 114, 123, 99 S.Ct. 2198, 2204. Jennings points to nothing in the record to suggest the state's indictment reflects discrimination against a class of defendants. The state's decision to charge Jennings with felony murder rather than involuntary manslaughter did not violate Jennings' constitutional rights.

{¶95} His constitutional arguments notwithstanding, Jennings further contends the language of R.C. 2903.02(B) makes the felony murder statute inapplicable where a defendant could be charged instead with involuntary manslaughter. "R.C. 2903.02(B) prohibits voluntary and involuntary manslaughter from serving as the predicate felony, but the statute does not prohibit prosecuting an offender for felony murder merely because the offender could have also been charged with voluntary or involuntary manslaughter." *Walters* at ¶65. The trial court did not err in entering a guilty verdict against Jennings on the charge of felony murder.

{¶96} Accordingly, we overrule Jennings' second and third assignments of error.

VIII. Jennings' Fifth Assignment of Error – Aggravated Robbery Instruction

{¶97} Jennings' fifth assignment of error asserts the trial court improperly instructed the jury on aggravated robbery when it omitted from the "deadly weapon" portion the requirement that the offender "displayed, brandished, indicated possession or used a deadly weapon during the commission of the alleged robbery." (Jennings' brief at 20, citing *State v. Underwood* (1983), 3 Ohio St.3d 12, syllabus.) Jennings further asserts the instruction erroneously required the jury to find both the "deadly weapon" element and

the "serious physical harm element," as opposed to one or the other. Jennings contends the mistakes in instructing the jury constitute reversible error.

{¶98} "As a general rule, a defendant is entitled to have the jury instructed on all elements that must be proved to establish the crime with which he is charged." *State v. Adams* (1980), 62 Ohio St.2d 151, 153. Jennings, however, did not object to the jury instructions in the trial court. To circumvent that issue, Jennings on appeal asserts the error in the jury instructions is structural error, so that his failure to object is immaterial. Any error here is not structural. *Neder v. United States* (1999), 527 U.S. 1, 8-9, 119 S.Ct. 1827, 1833 (stating an error in jury instructions, even when the instructions omit an element of the offense, often is not necessarily structural, but rather warrants plain-error review). Because Jennings did not object at trial to the errors in the jury instructions he now asserts, he waived all but plain error. *State v. Wamsley*, 117 Ohio St.3d 388, 2008-Ohio-1195, ¶25; *State v. Tanksley*, 10th Dist. No. 07AP-262, 2007-Ohio-6596, ¶19, citing *State v. Locklear*, 10th Dist. No. 06AP-259, 2006-Ohio-5949, ¶25; Crim.R. 52(B).

{¶99} The trial court's failure to instruct on each element of an offense does not warrant reversal as plain error. *Adams*, at paragraph two of the syllabus. In its jury instructions on the aggravated robbery charge, the trial court referred to the "deadly weapon" and the "serious physical harm" elements in the conjunctive instead of the disjunctive. Either one of the elements would have been sufficient to prove aggravated robbery. R.C. 2911.01(A)(1), (3). By requiring the jury to find both elements, the trial court's instructions made the state's proof more difficult. Additionally, because the jury necessarily found the "serious physical harm" element, the trial court's incomplete instruction on the "deadly weapon" element had no effect on the outcome of the trial.

Jennings, therefore, does not point to anything in the record to demonstrate that, but for these errors, "the outcome of the trial clearly would have been otherwise." *Long* at paragraph two of the syllabus.

{¶100} Finding no plain error, we overrule Jennings' fifth assignment of error.

IX. Jennings' Eighth Assignment of Error – Prosecutorial Misconduct

{¶101} Jennings' eighth assignment of error asserts the prosecution's misconduct deprived him of his right to a fair trial and due process of law, as the prosecution's "extended, deliberate conduct tended to mislead the jury and prejudice the defendant in a case that was indisputably weak." (Jennings' brief, 30.) Jennings asserts the prosecution (1) used the opening statement to improperly and repeatedly discuss matters not placed into evidence, (2) improperly questioned witnesses, and (3) used the closing argument to state facts not in evidence and make inflammatory comments about defendant's arguments.

{¶102} The test for prosecutorial misconduct is whether the prosecution's conduct was improper and, if so, whether the conduct prejudicially affected the defendant's substantial rights. *State v. Smith* (1984), 14 Ohio St.3d 13, 14. " '[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.' " *Wilkerson* at ¶38, quoting *Smith v. Phillips* (1982), 445 U.S. 209, 219, 102 S.Ct. 940, 947. As such, prosecutorial misconduct is not grounds for reversal unless the defendant has been denied a fair trial. *State v. Maurer* (1984), 15 Ohio St.3d 239, 266.

{¶103} For many of the claimed instances of misconduct, Jennings failed to object, thus forfeiting all but plain error review on these claims. *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, ¶139; *State v. Saleh*, 10th Dist. No. 07AP-431, 2009-Ohio-1542, ¶68.

A. Opening Statement

{¶104} Jennings argues the prosecution committed misconduct in its opening statement when it: (1) stated "the State does not suggest and will never suggest that [defendants'] purpose was to go there and kill Robert Hunter," yet the state indicted and sought a conviction for intentional murder against both defendants; (2) attributed statements to Jennings' purported brother without calling the alleged brother to testify or entering those statements into evidence; (3) misstated the number of gunshots Victor said he heard the night of Hunter's murder; (4) stated multiple witnesses picked Mock out of a lineup when Victor never picked Mock out of a lineup; (5) attributed to Victor motives for contacting police to which he never testified; (6) stated Victor was released on parole when he actually was released after serving a parole violation; and (7) improperly bolstered Victor's credibility throughout the opening statement.

{¶105} In item (1), Jennings misapplies Ohio's felony murder statute. Although aggravated murder under R.C. 2903.01(B) requires purpose to kill, R.C. 2903.02(B) does not require that death be the purpose of the underlying felony. That Hunter was killed in the commission of the underlying felony of aggravated robbery satisfies R.C. 2903.02(B). Jennings' counsel did not object to the statement during the prosecution's opening statement, and it did not prejudice Jennings, and does not rise to the level of plain error.

{¶106} In items (2) through (6), Jennings claims the prosecution mentioned facts in opening statement that were not placed into evidence. In general, courts grant both

parties considerable latitude during opening statement for "fair comment on the facts to be presented at trial." *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, ¶157, citing *Maggio v. Cleveland* (1949), 151 Ohio St. 136, paragraph two of the syllabus; see also *Ballew* at 255. The trial court here instructed the jury, both before opening statements and in its final instructions, that opening statements are not evidence. (Tr. 20-21, 520.) The jury is presumed to have followed the court's instructions. *Leonard* at ¶157, citing *State v. Loza* (1994), 71 Ohio St.3d 69, 79. The prosecution's conduct thus "must have been so extreme so as to deprive the defendant of a fair trial in order for reversible error to be present." *State v. Banks*, 10th Dist. No. 03AP-1286, 2005-Ohio-1943, ¶9, citing *State v. Keenan* (1993), 66 Ohio St.3d 402.

{¶107} Jennings does not indicate how the outcome of the trial clearly would have been different but for the statements he complains of in items (2) through (6). The record reveals the prosecution offered evidence on items (3) through (6) that, while not phrased exactly as the prosecution mentioned it during opening statement, was substantially similar. Opening statements, however, are intended only to advise the jury what the parties expect the evidence will show. *State v. Heer* (Sept. 24, 1998), 10th Dist. No. 97APA12-1670, citing *State v. Brown* (1996), 112 Ohio App.3d 583, 599. Nothing in the record suggests the prosecution's minor deviations in opening statements either were made in bad faith or prejudiced Jennings. Additionally, while the state did not introduce the statements complained of in item (2), the prosecution's failure to prove facts outlined in its opening statement does not amount to misconduct because the record contains no evidence it was done in bad faith. *Brown* at 599.

{¶108} In item (7), Jennings argues the prosecution used its opening statement to improperly bolster Victor's credibility. Referring to Victor, the prosecution in opening statement said "he's not too interested in getting himself in trouble" and "[h]e's paid his debt to society for what he did." Victor's prior criminal record was in evidence, and the prosecution expected Victor to testify to his reasons for coming forward with information regarding Hunter's murder. Moreover, even if the prosecution's conduct deviates slightly from appropriate conduct, we do not see, and Jennings does not explain, how the outcome of the trial would have been different but for these remarks in the prosecution's opening statement. No plain error arises from the prosecution's opening statement.

B. Questioning Witnesses

{¶109} Jennings next argues the prosecution committed misconduct in questioning witnesses when it: (1) improperly bolstered Victor's and Cawthon's credibility on direct examination; (2) asked Cawthon about seeing defendants with weapons despite the trial court's admonition; (3) persistently asked leading questions on direct exam; and (4) frequently elicited hearsay statements.

{¶110} On direct examination, the prosecution asked Victor if he received anything of value or any promises from the state in return for his testimony. The trial court overruled Jennings' objection, stating that "[t]his is an issue we went into [a] great deal during voir dire and during opening statement." In the same vein, the prosecution asked Cawthon on direct examination whether he ever asked for or received any special treatment in exchange for his testimony. Jennings, however, remarked in his opening statement that the state's case would "boil down to the testimony of one witness or two witnesses who have a substantial reason to come in here and testify." (Tr. 38.) The trial

court properly overruled Jennings' objection, as the prosecution is entitled to respond to such comments made in opening statement. See *State v. Goodwin*, 84 Ohio St.3d 331, 339-40, 1999-Ohio-356.

{¶111} Jennings also contends the prosecution acted inappropriately when it asked Cawthon if he ever saw either defendant with weapons. Although Cawthon answered affirmatively, the trial court sustained Jennings' objection and instructed the jury to disregard Cawthon's answer. The jury is presumed to have followed the court's instruction. *Leonard* at ¶157. Jennings nonetheless argues that, despite the court's instruction, the prosecution's question amounts to misconduct because the prosecution ignored the trial court's admonition not to elicit testimony from Cawthon regarding defendants' prior bad acts.

{¶112} The prosecution explained it understood the admonition to relate only to stolen weapons and prior bad acts; the prosecution clarified that it questioned Cawthon about what type of gun defendants carried solely as a means of identification. (Tr. 315-16.) Even if the question were outside the permissible bounds under the trial court's preliminary ruling, nothing suggests the line of questioning was committed in bad faith. Moreover, the record fails to demonstrate reversible error in view of the trial court's sustaining defendant's objection and instructing the jury to disregard Cawthon's answer.

{¶113} While Jennings argues the prosecution's questions frequently elicited hearsay statements, Jennings' objections at trial either successfully prevented the witnesses from answering, resulted in an appropriate limiting instruction, or caused the prosecution to rephrase the question. Jennings fails to demonstrate the prosecution's method of questioning witnesses prejudiced him in light of the court's rulings. See *State v.*

Drayer, 159 Ohio App.3d 189, 2004-Ohio-6120, ¶19, citing *State v. Joseph* (Dec. 23, 1993), 3d Dist. No. 1-91-11.

C. Closing Argument

{¶114} Jennings also asserts the prosecution acted improperly during its closing argument when it: (1) injected a personal opinion; (2) personally vouched for a witness' credibility; (3) stated facts not in evidence; and (4) made inflammatory comments about defendant's arguments.

{¶115} The personal opinion Jennings complains of stems from the prosecution's comment during closing argument that Victor "bravely" came forward to testify. (Tr. 461.) As with opening statements, trial courts afford the prosecution wide latitude in closing arguments. *State v. Benge*, 75 Ohio St.3d 136, 141, 1996-Ohio-227. When the prosecution made the comment at issue, the prosecution did not imply knowledge of facts outside the record. *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, ¶117, citing *State v. Keene* (1998), 81 Ohio St.3d 646. Rather, the prosecution based its comment on evidence adduced at trial, namely that Victor testified against his own cousin despite his comments that he feared his family's resulting reaction.

{¶116} Jennings also argues the prosecution personally vouched for the credibility of its witness in describing Detective Young as "the most patient Detective I've known." (Tr. 509.) Jennings' counsel objected at trial, and the trial court sustained the objection, explaining to the jury that "[t]here's always a little bit of hyperbole in closing arguments." (Tr. 509.) The trial court instructed the jury that the prosecution's comment was not evidence, and the jury is presumed to have followed this instruction. *Leonard* at ¶157.

{¶117} Jennings also argues the prosecution stated facts not in evidence during the closing argument. One such instance was the prosecution's remark that Victor "saw" Mock fire a weapon into the house. The prosecution, however, immediately corrected the statement and said Victor "heard" the shots before turning around. (Tr. 507.) The other instances Jennings notes involve the prosecution's characterizing the testimony of Victor and Cawthon as "identical" and suggesting Mock may have alerted Jennings a warrant existed for his arrest. (Tr. 514.) Jennings did not object at trial, and no plain error occurred when the prosecution connected the similarities between Victor's and Cawthon's testimony; nor is plain error evident in the prosecution's suggesting Mock and Jennings remained in contact. See *State v. Phillips*, 74 Ohio St.3d 72, 90-91, 1995-Ohio-171 (stating counsel receives considerable latitude during closing arguments, including in making inferences and deductions).

{¶118} Jennings further contends the prosecution engaged in misconduct during closing argument when it commented that, contrary to defendant's closing argument, the state did not force Victor and Cawthon to testify because "[t]his isn't that prison down in Cuba." After Jennings' counsel objected, the trial court instructed the jury that closing argument is not evidence. The jury is presumed to have followed that instruction. *Leonard* at ¶157. Moreover, Jennings fails to explain how the remark rises to the level of prejudice necessary for us to find reversible error.

{¶119} In the final analysis, no reversible error occurred in the prosecution's conduct. Where defense counsel objected, the trial court properly handled those objections by sustaining them, providing appropriate limiting instructions or both. Where defense counsel did not object, Jennings cannot show that the outcome of trial clearly

would have been different but for the prosecution's conduct. Accordingly, we overrule Jennings' eighth assignment of error.

X. Jennings' Ninth Assignment of Error – Ineffective Assistance of Counsel

{¶120} Jennings' ninth assignment of error asserts his trial counsel provided ineffective assistance. Specifically, Jennings argues his trial counsel was deficient in: (1) failing to raise a religion-based *Batson* objection during voir dire; (2) failing to make a general objection that asked for a new trial based on prosecutorial misconduct; (3) failing to ask for an involuntary manslaughter instruction as a lesser included offense of aggravated murder; (4) failing to request separate verdict forms to clarify findings the jury made in order to convict; (5) failing to object to the incorrect aggravated robbery instruction submitted to the jury; (6) failing to request a more specific accomplice instruction; and (7) failing to seek severance under Crim.R. 14 because of the potential *Bruton* issue.

{¶121} To prove ineffective assistance of counsel, Jennings must show that his counsel's performance was deficient. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 2064. Jennings thus must show his counsel made errors so serious that counsel was not functioning as the "counsel" the Sixth Amendment guarantees. Id. Jennings also must establish that his counsel's deficient performance prejudiced him, demonstrating that counsel's errors were so serious as to deprive Jennings of a fair trial, a trial whose result is reliable. Id. Unless Jennings makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable. Id.

{¶122} In items (1), (2), and (5), Jennings argues his trial counsel was ineffective in not raising certain objections. In each of these items, Jennings "recasts one of his substantive propositions of law into an ineffective-assistance claim." *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, ¶233. " 'The failure to object to error, alone, is not enough to sustain a claim of ineffective assistance of counsel.' " Id., citing *State v. Holloway* (1988), 38 Ohio St.3d 239, 244. Having already found Jennings' recast assignments of error are not prejudicial, Jennings' counsel's failure to object on these grounds does not render his assistance ineffective.

{¶123} In item (3), Jennings argues his trial counsel was ineffective in failing to request an instruction on involuntary manslaughter as a lesser included offense of aggravated murder. An instruction on a lesser included offense is appropriate "only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense." *State v. Thomas* (1988), 40 Ohio St.3d 213, paragraph two of the syllabus. Since the jury convicted Jennings of aggravated robbery, no reasonable juror could conclude that the underlying felony causing Hunter's death was not a first-or second-degree felony offense of violence. Additionally, any constitutional challenge to R.C. 2903.02(B) would have been overruled. Thus, the failure of Jennings' trial counsel to request the instruction did not amount to ineffective assistance.

{¶124} Item (4) asserts Jennings' trial counsel was deficient in failing to request separate verdict forms to specify whether the jury found Jennings guilty as a principle offender or as an accomplice. R.C. 2923.03(F), however, draws no distinction between an offender prosecuted under complicity or as a principle offender. See also *State v.*

Alexander, 6th Dist. No. WD-02-047, 2003-Ohio-6969, ¶70 (holding separate verdict forms are not needed in such a situation), citing *State v. Luke* (Feb. 1, 1999), 3d Dist. No. 4-98-13. Defense counsel's failure to request separate verdict forms or to request clarification when the verdicts were read was not ineffective assistance of counsel.

{¶125} The accomplice instruction Jennings refers to in item (6) would have instructed the jury it could not find Jennings guilty of complicity solely on the testimony of an accomplice. Jennings' argument, however, ignores the 1986 amendment to R.C. 2923.03(D) that eliminated the need for corroboration of an accomplice's testimony and instead substitutes an instruction regarding the credibility of accomplice testimony. See *State v. Evans* (1992), 63 Ohio St.3d 231, 240-41. In any event, Victor was not an "accomplice" within the meaning of either the former or current version of the statute. *Wickline* at 118; *Olverson* at ¶54. Jennings' trial counsel was not deficient in failing to seek such an instruction.

{¶126} Lastly, Jennings argues in item (7) that his trial counsel should have sought severance under Crim.R. 14 when he became aware of the potential *Bruton* issue. Although he did not move for severance, Jennings' trial counsel requested either the exclusion of Mock's out-of-court statements or an appropriate limiting instruction. Jennings' trial counsel may well have had a strategic reason for not seeking severance, perhaps finding some benefit in the pooled resources of a joint trial. See, e.g., *State v. Martin* (July 31, 2001), 10th Dist. No. 99AP-150, citing *Brown* at 319 (noting "[a] defendant is not denied effective assistance of counsel when defense counsel chooses, for strategic reasons, not to pursue every possible trial tactic"). Moreover, Jennings cannot demonstrate the outcome of his trial would have been different had his trial

counsel requested and received a severance. As discussed in his sufficiency and manifest weight arguments, ample other evidence existed upon which a jury could base Jennings' convictions.

{¶127} Since Jennings is unable to show prejudice from any of the alleged instances of his trial counsel's deficiencies, Jennings was not deprived of effective assistance of counsel. We therefore overrule Jennings' ninth assignment of error.

XI. Disposition

{¶128} Having overruled Mock's four assignments of error and Jennings' nine assignments of error, we affirm the judgments of the Franklin County Court of Common Pleas.

Judgments affirmed.

FRENCH, P.J., concurs.
TYACK, J., concurs separately.

TYACK, J., concurring separately.

{¶129} Although I agree with most of what has been written in the majority decision, I disagree with several comments about the situations in which the mandatory charge to the jury about the testimony of an alleged accomplice must be given. However, based upon the evidence at trial, the trial judge could legitimately find that Victor Brown was not an accomplice or an alleged accomplice to the robbery and murder of Robert Hunter. Since the trial judge was within his discretion to find Victor Brown was not an accomplice or alleged accomplice, the trial judge was also within his discretion not to give the mandatory charge regarding testimony of an accomplice set forth in R.C. 2923.03(D). I therefore concur in the result reached by the majority, but not all of its words.

{¶130} When Ohio's "new" criminal code was enacted in 1974, the code included a provision in R.C. 2923.03 which expressly barred a person being convicted of a crime based upon the uncorroborated testimony of an accomplice, no matter how credible that testimony might be.

{¶131} In 1986, the statute was amended to allow a conviction to be based upon the uncorroborated testimony of an accomplice, but the Ohio Legislature mandated in R.C. 2923.03(D):

> If an alleged accomplice of the defendant testifies against the defendant in a case in which the defendant is charged with complicity in the commission of or an attempt to commit an offense, the court, when it charges the jury, shall state substantially the following:
>
> "The testimony of an accomplice does not become inadmissible because of his complicity, moral turpitude, or self-interest, but the admitted or claimed complicity of a witness may affect his credibility and make his testimony subject to grave suspicion, and require that it be weighed with great caution.
>
> It is for you, as jurors, in the light of all the facts presented to you from the witness stand, to evaluate such testimony and to determine its quality and worth or its lack of quality and worth."

{¶132} R.C. 2923.03(D) requires that the charge be given whenever an alleged accomplice testifies. I do not believe that the prosecution can avoid this charge being given to the jury by merely delaying pressing of charges against its key witness until after the trial is computed. If the trial judge views the person who is testifying as an accomplice, the charge must be given, regardless of the wishes or acts of the prosecution.

{¶133} Here, Victor Brown had advised against the robbery because of a nearby police substation. Brown had advised against the robbery because of fears the victim was heavily armed, fears which proved to be well founded after Robert Hunter was found to have been in possession of two firearms at the time the attempt to rob him occurred. Most significantly of all, Victor Brown abandoned the whole project by walking or running away when it became clear that Jennings and Mock were going forward with the robbery attempt anyway. See R.C. 2923.03(E).

{¶134} Under the circumstances, the mandatory jury charge did not have to be given. However, I believe the charge must be given in a wide range of circumstances where the prosecutor makes a deal with an alleged accomplice under the terms of which criminal charges are delayed until after trial or not pursued at all.

{¶135} To the extent the majority decision implies or states otherwise, I disagree. Hence, I concur separately.

_____