[Cite as *State v. Mitchell*, 2011-Ohio-3818.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-756 (C.P.C. No. 09CR-08-4832)
Shane D. Mitchell,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on August 4, 2011

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

Timothy Young, Ohio Public Defender, *Claire R. Cahoon*, and *Craig M. Jaquith*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶1} Defendant-appellant, Shane D. Mitchell ("appellant"), appeals the judgment of the Franklin County Court of Common Pleas, which convicted him of aggravated murder with a firearm specification, aggravated robbery with a firearm

specification, having a weapon while under disability, and tampering with evidence. For the following reasons, we affirm.

{¶2} Appellant was indicted on the above charges after a June 15, 2009 shooting incident resulting in Kenneth Jenkins' death, and appellant pleaded not guilty. A jury trial was scheduled for October 14, 2009, but on that date, the trial was continued to January 11, 2010, on motion of appellant's defense counsel and the prosecution. The trial court noted in an entry that it was granting the continuance because discovery had not been completed. Additionally, the entry noted that defense counsel was waiving appellant's "right to a speedy trial for the period of this continuance." The entry also indicated, however, that appellant did not agree with the continuance and did not want to waive his speedy trial rights.

{¶3} On January 11, 2010, the prosecution requested a continuance because of the need for additional lab tests on physical evidence, and the trial was rescheduled for March 15, 2010. Defense counsel waived appellant's speedy trial rights for the period of the continuance because he needed to conduct additional investigation, too. Appellant, however, disagreed with the trial being continued.

{¶4} On March 10, 2010, the prosecution and defense counsel requested a continuance of the March 15th trial date for "[f]urther investigation required by counsel" and "further discussions required by parties." The trial was rescheduled for May 3, 2010, and defense counsel waived appellant's speedy trial rights for the period of the continuance. Appellant disagreed with that continuance, too.

{¶5} On March 25, 2010, the trial court appointed new counsel for appellant, and the prosecution moved for a continuance on May 3, 2010 due to additional

investigation and negotiations. Defense counsel objected to the continuance, but the trial court granted it and rescheduled the trial for May 26, 2010. On that rescheduled date, defense counsel filed a motion to suppress, and, because of that motion, the parties requested a continuance, with defense counsel waiving appellant's speedy trial rights for the period of the continuance. Defense counsel subsequently withdrew the motion, however, and the trial started on June 1, 2010.

{¶6} At the beginning of voir dire, the trial court admonished the prospective jurors not to discuss the case with third parties. After four of the prospective jurors were excused, the trial court brought on four new prospective jurors, but it did not provide them the admonition it had given previously.

{¶7} During voir dire, prospective juror J.P. said that she would not be impartial in a trial involving a murdered child, but defense counsel told J.P. that the victim in this case was an adult. J.P. also indicated that although she was a victim of felonious assault 35 years ago, she would not let that past event interfere with her obligation to decide appellant's case on the evidence presented at trial. Prospective juror C.G. said during voir dire that she would believe a witness who was sworn to tell the truth, however she clarified, "I would try to be objective as far as whether that person * * * is believable or not. I would have to rely on the questions that are asked and answers that are given to be able to conclude there would be reasonable doubt." (Voir Dire Tr. 95.) Appellant's counsel asked prospective juror H.M. what would happen if the prosecution failed to present any believable witnesses, and H.M. said, "[i]f there is reasonable doubt, it is not guilty." (Voir Dire Tr. 95.) She noted that if she believed the prosecution's witnesses, and was convinced of appellant's guilt beyond a reasonable doubt, she

would vote guilty. She also understood that appellant was presumed innocent. Lastly, prospective juror K.D. feared that she might faint during trial if exposed to gory pictures, but she said she would not allow the pictures to "have any impact on swaying [her] one way or another." (Voir Dire Tr. 112.) She also said that she would not hold it against appellant if she were shown gory pictures. J.P., C.G., H.M., and K.D. were placed on the jury without any objection from defense counsel, and all of the selected jurors were sworn in with the oath of service.

{¶8} Columbus Police Officer Scott Branch testified that he was called to the apartment complex where the June 15, 2009 shooting occurred. He found Jenkins wounded and lying on the ground. Mark Hardy, a forensic scientist with the Columbus Police Department, testified that an examination of bullet casings recovered from the scene of the shooting established that three separate guns were fired during the incident.

{¶9} Rayshawn Garrard was at the apartment complex where the shooting occurred, and he testified as follows about events that took place that day. Before the shooting, Garrard was with appellant, Jason Lindsey, and Lukeus and Markus Thomas. Garrard went "up north" with these men to visit two women, and they returned to the apartment complex after about 45 to 50 minutes. (Tr. 114.) Lindsey asked Garrard to find an abandoned apartment because he wanted to "cut-up" some crack cocaine. (Tr. 116.) Garrard found an empty apartment, entered through the window, and let appellant, Lindsey, and Lukeus in through the front door. Five minutes later, Garrard left and went to a friend's apartment.

{¶10} While at his friend's apartment, Garrard heard gunshots. He looked outside and saw Jenkins running. He also saw three arms firing guns, but he could not see who was actually firing the guns. After the shots were fired, he saw appellant, Lindsey, Lukeus, and Markus get in a car. Appellant was in the driver's seat, and he drove away. The police arrived, and Garrard identified the four men.

{¶11} Garrard was never charged in the shooting incident, however he was indicted on an unrelated matter. Although Garrard obtained no plea bargain in regard to that indictment, the prosecutors in appellant's case agreed to tell the prosecutors on the other indictment that Garrard was testifying against appellant. The prosecutors in appellant's case told Garrard that it was important that he testify truthfully.

{¶12} On cross-examination, Garrard admitted that he told police officers that he saw Lindsey, Markus, and Lukeus fire shots at Jenkins, but he explained that he was conveying what he heard from another witness named Shanell. Garrard also acknowledged that a detective he spoke with threatened to charge him for the shooting unless he told the truth.

{¶13} Next, Lukeus testified as follows. Lukeus admitted to having prior convictions for robbery, receiving stolen property, possession of drugs, and carrying a concealed weapon. He also said that he was charged with aggravated murder, aggravated robbery, and having a weapon while under disability for the June 15, 2009 shooting, and that he entered into a plea bargain with the prosecution where he agreed to testify truthfully against appellant in exchange for pleading guilty to one count of involuntary manslaughter.

{¶14} Lukeus testified that Lindsey and Markus were his brothers and that appellant was a life-long friend. On June 15, 2009, Lukeus was talking with Lindsey, appellant, and Garrard in an abandoned apartment. Markus was outside talking with a woman. The men in the apartment planned to obtain drugs from Jenkins and then rob him. Appellant contacted Jenkins, using Lukeus' cell phone. Jenkins had previously robbed appellant, and Lukeus was going to assault Jenkins because appellant was still upset about that robbery. At first, when the prosecutor asked Lukeus if appellant agreed to the plan to rob Jenkins, Lukeus said "[n]ot really." (Tr. 200.) But he later said that appellant did agree to the plan.

{¶15} After Jenkins was called to the scene, Lindsey left the apartment to confront him. Moments later, Lukeus, who was still in the apartment with appellant, heard a commotion outside, and appellant handed him a gun. Lukeus went outside and saw Lindsey arguing with Jenkins. Jenkins reached for a gun, and Lukeus, Lindsey, and Markus fired their guns. Afterward, Lukeus, Markus, and Lindsey fled to appellant's car, and appellant drove them to his girlfriend's apartment, where appellant took the gun from Lukeus. Lukeus acknowledged that when he initially talked with prosecutors about the shooting, he lied by saying that appellant was one of the individuals who shot Jenkins and that Markus was not a shooter.

{¶16} On cross-examination, Lukeus said that, before the shooting, appellant drove him, Markus, Lindsey, and Garrard "up north" to a bar in order for Garrard to meet a drug dealer, but the dealer never appeared. (Tr. 227.) Lukeus also testified that Lindsey used his phone on the day of the shooting, but he said Lindsey did not call

Jenkins. Lastly, Lukeus stated that nothing was taken from Jenkins during the shooting incident.

{¶17} Dr. Obinna Ugwu of the coroner's office testified that Jenkins died from multiple gunshot wounds. Detective James Porter testified that he interviewed appellant after the shooing. Appellant admitted to being at the scene of the shooting and to fleeing the scene with Lukeus, Markus, and Lindsey. Appellant indicated that he drove the men to his girlfriend's apartment, where he took the other men's guns and gave them away. He initially offered to help Porter find the guns, but he later changed his mind and refused to do so. Appellant also claimed that he might have spoken with Jenkins on the day of the shooting.

{¶18} The prosecution rested its case, and appellant exercised his right not to testify. The prosecution gave its initial closing argument, asserting that appellant could be convicted under a complicity theory for aiding and abetting in the crimes against Jenkins, and the defense responded with its closing argument. Before the prosecution had an opportunity for rebuttal argument, however, the trial court held a hearing on juror T.S.'s claim that, one time when court was in recess, he was outside the courtroom and heard two women talking about how Garrard was lying. T.S. said he was with another male juror at the time, but he did not remember who the other juror was. The trial court spoke with the other male jurors, individually, and each of them denied hearing any comments about the case from anyone while outside the courtroom. And, the other male jurors stated that they remained fair and impartial. The trial court decided to remove T.S. from the jury and replace him with an alternate juror, but the court allowed

the other male jurors to remain. The court waited to replace T.S. until after the prosecution gave its rebuttal argument, but before deliberations.

{¶19} Thereafter, the jury found appellant guilty as charged. At the sentencing hearing, appellant claimed to have learned that a female juror revealed her bias against him to a friend of his. After allowing appellant to place his comments on the record, the trial court sentenced him to prison.

{¶20} Appellant appeals, raising the following assignments of error:

> [I.] CONTINUING APPELLANT'S CASE NUMEROUS TIMES OVER A YEAR LONG PERIOD WITHOUT HIS CONSENT PREJUDICED HIM AND VIOLATED HIS DUE PROCESS RIGHTS AND HIS RIGHT TO A SPEEDY TRIAL UNDER R.C. § 2945.71 AND THE 5TH, 6TH, AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION, AND ARTICLE I, SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION.
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> [II.] THE APPELLANT WAS DEPRIVED OF HIS RIGHT TO HAVE THE JURORS APPLY THE CORRECT STANDARD OF LAW TO THEIR DELIBERATIONS UNDER THE 5TH AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 1 & 16 OF THE OHIO CONSTITUTION, WHEN THE COURT FAILED TO PROPERLY INSTRUCT THE JURY ON THE LAW OF COMPLICITY, ATTEMPT, AND FLIGHT, AND WHEN THE PROSECUTOR IMPROPERLY ARGUED THAT AN ATTEMPTED ROBBERY OCCURRED AND MISSTATED THE LAW OF COMPLICITY TO THE JURORS.
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> [III.] APPELLANT'S CONVICTIONS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND WERE NOT SUPPORTED BY SUFFICIENT EVIDENCE IN VIOLATION OF THE 14TH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 1 & 16 OF THE OHIO CONSTITUTION.
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> [IV.] TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE, AND THE COURT VIOLATED APPELLANT'S RIGHT TO A FAIR JURY IN ITS

MANAGEMENT OF THE JURY SELECTION PROCESS AND ALLEGATIONS OF JURY MISCONDUCT IN VIOLATION OF THE 6TH AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION.

{¶21} In his first assignment of error, appellant argues that he was denied his right to a speedy trial. But we need not address that argument because appellant failed to file a motion to dismiss on speedy trial grounds. *State v. Taylor*, 98 Ohio St.3d 27, 2002-Ohio-7017, ¶37; *Worthington v. Ogilby* (1982), 8 Ohio App.3d 25, 27. Appellant also claims that his defense counsel failed to protect his speedy trial rights. We will address that issue in his fourth assignment of error, which raises ineffective assistance of counsel. Nevertheless, because we decline to address appellant's speedy trial violation claim, we overrule his first assignment of error.

{¶22} We next address appellant's third assignment of error, in which he claims that there was insufficient evidence to support his convictions for aggravated murder, aggravated robbery, and tampering with evidence. We disagree.

{¶23} Sufficiency of the evidence is a legal standard that tests whether the evidence introduced at trial is legally sufficient to support a verdict. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. We examine the evidence in the light most favorable to the state and conclude whether any rational trier of fact could have found that the state proved beyond a reasonable doubt the essential elements of the crime. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus; *State v. Yarbrough,* 95 Ohio St.3d 227, 2002-Ohio-2126, ¶78. We will not disturb the verdict unless we determine that reasonable minds could not arrive at the conclusion reached by the trier of fact. *Jenks* at 273. 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. See *Jenks,* paragraph two of the syllabus; *Yarbrough* at ¶79 (noting that courts do not evaluate witness credibility when reviewing a sufficiency of the evidence claim).

{¶24} We now consider appellant's aggravated robbery conviction. Aggravated robbery occurs when someone inflicts serious physical harm on another while committing or attempting to commit a theft offense. R.C. 2911.01. The prosecution alleged that appellant was guilty of aggravated robbery under a complicity theory because he aided and abetted his accomplices in that offense. To prove complicity by aiding and abetting, the prosecution must show that "the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal." *State v. Johnson*, 93 Ohio St.3d 240, 245, 2001-Ohio-1336. Participation " 'in criminal intent may be inferred from presence, companionship and conduct before and after the offense is committed.' " Id., quoting *State v. Pruett* (1971), 28 Ohio App.2d 29, 34. " 'Mere approval or acquiescence, without expressed concurrence or the doing of something to contribute to an unlawful act, is not an aiding or abetting of the act.' " *State v. Philpot*, 10th Dist. No. 03AP-758, 2004-Ohio-5063, ¶26 (citations omitted).

{¶25} Appellant argues that the evidence failed to establish that he had any role in aiding or abetting the aggravated robbery against Jenkins. If believed, however, Lukeus' testimony established that appellant agreed with the plan to rob Jenkins and that he aided and abetted in the execution of that plan by calling Jenkins to the apartment complex and providing Lukeus with a gun. Furthermore, Lukeus and Garrard

testified that appellant assisted his accomplices by driving them away from the scene after the incident, and appellant admitted to that fact. In addition, the jury could have considered that appellant was motivated to aid and abet in the aggravated robbery because Jenkins had previously robbed him. See *State v. Washington*, 10th Dist. No. 09AP-424, 2009-Ohio-6665, ¶28 (recognizing that motive is generally relevant in all criminal trials, even though the prosecution need not prove motive to secure a conviction).

{¶26} Appellant also argues that his aggravated robbery conviction cannot stand because the theft against Jenkins was not completed. To support this argument, appellant relies on Lukeus testifying that nothing was taken from Jenkins. It is not necessary, however, that a theft actually be completed for an aggravated robbery to occur because, as clearly indicated by R.C. 2911.01, an attempted theft is sufficient. See *State v. Davis* (July 28, 1977), 10th Dist. No. 76AP-957. Attempt is " 'an act or omission constituting a substantial step in a course of conduct planned to culminate in [the actor's] commission of the crime.' " *State v. Group*, 98 Ohio St.3d 248, 2002-Ohio-7247, ¶101, quoting *State v. Woods* (1976), 48 Ohio St.2d 127, paragraph one of the syllabus. Here, the evidence, construed in a light most favorable to the prosecution, established that an attempted theft occurred. Specifically, Jenkins was called to the scene of the apartment complex. After he arrived, Lindsey confronted him to execute the plan to steal from him. Lindsey was armed with a gun, and when Jenkins showed resistance, Lukeus and Markus came to Lindsey's assistance. For all these reasons, we conclude that there was sufficient evidence to support appellant's aggravated robbery conviction.

{¶27} Next, appellant argues that the evidence failed to show that he aided and abetted in the aggravated murder offense. Under R.C. 2903.01, aggravated murder occurs when a person purposely causes the death of another while committing aggravated robbery. Appellant contends that the evidence failed to prove the underlying aggravated robbery offense, but we have already concluded that there was sufficient evidence to prove that offense.

{¶28} Appellant additionally asserts that there was no evidence that those who shot Jenkins had a purpose to kill him. But when, as here, "an inherently dangerous instrumentality was employed, a homicide occurring during the commission of a felony is a natural and probable consequence presumed to have been intended," and therefore, "[s]uch evidence is sufficient to allow a jury to find a purposeful intent to kill." *State v. Jester* (1987), 32 Ohio St.3d 147, 152, citing *State v. Clark* (1978), 55 Ohio St.2d 257, and *State v. Johnson* (1978), 56 Ohio St.2d 35. Also establishing the shooters' culpability is that they fled the scene afterward without showing any regard for Jenkins' well-being. See *State v. Tatum* (Mar. 6, 2001), 10th Dist. No. 99AP-1141.

{¶29} Appellant further asserts that there was no evidence that he shared his accomplices' purpose to kill Jenkins. A jury can infer an aider and abettor's purpose to kill where the facts show that the participants in a felony entered into a common design, and the aider and abettor knew that an inherently dangerous instrumentality was to be employed to accomplish the crime or the manner of its accomplishment would be reasonably likely to produce death. *State v. Scott* (1980), 61 Ohio St.2d 155, 165. Here, the jury reasonably inferred appellant's purpose to kill from the fact that he gave Lukeus a gun during the execution of the plan to steal from Jenkins. And, appellant's

flight from the scene and disposal of the guns after the shooting negate his claimed lack of culpability and, instead, demonstrate furtive conduct reflective of a consciousness of guilt. *Washington* at ¶30. Accordingly, we conclude that there was sufficient evidence to support appellant's aggravated murder conviction.

{¶30} Lastly, appellant argues that there was insufficient evidence to support his tampering with evidence conviction. R.C. 2921.12(A) defines tampering with evidence and states that "[n]o person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall * * * [a]lter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation." Appellant admitted that he took the guns used in the shooting and gave them away. Nevertheless, appellant contends that he disposed of the guns without knowing there would be a criminal investigation. But appellant's complicity in the crimes against Jenkins gave him cause to know that the police would investigate the incident and would be interested in the guns. See *State v. Copley*, 10th Dist. No. 04AP-511, 2005-Ohio-896, ¶60. Therefore, there was sufficient evidence to support appellant's tampering with evidence conviction.

{¶31} Next, appellant argues that the jury's verdict was against the manifest weight of the evidence. We disagree.

{¶32} In determining whether a verdict is against the manifest weight of the evidence, we sit as a " 'thirteenth juror.' " *Thompkins* at 387. Thus, we review the entire record, weigh the evidence and all reasonable inferences, and consider the credibility of witnesses. Id. Additionally, we determine "whether in resolving conflicts in the evidence, the [trier of fact] clearly lost its way and created such a manifest miscarriage

of justice that the conviction must be reversed and a new trial ordered." Id., quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. We reverse a conviction on manifest weight grounds for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins* at 387, quoting *Martin* at 175. Moreover, " 'it is inappropriate for a reviewing court to interfere with factual findings of the trier of fact * * * unless the reviewing court finds that a reasonable juror could not find the testimony of the witness to be credible.' " *State v. Brown*, 10th Dist. No. 02AP-11, 2002-Ohio-5345, ¶10, quoting *State v. Long* (Feb. 6, 1997), 10th Dist. No. 96APA04-511.

{¶33} Appellant claims that the weight of the evidence did not establish that he used Lukeus' phone to call Jenkins because Lindsey and Lukeus also had access to that phone. But the fact that others had access to Lukeus' phone does not, itself, discount evidence indicating that appellant also had access to the phone and that he used it to call Jenkins.

{¶34} Alternatively, appellant argues that the weight of the evidence established that he only called Jenkins to buy drugs and not to lure him over to the apartment complex to be victimized. Given the well-established motive appellant had to retaliate against Jenkins, however, it was within the province of the jury to conclude that appellant made the call to advance the criminal plan in which he was complicit.

{¶35} In addition, appellant asserts that Lukeus was not credible because he entered into a plea bargain with the prosecution. But Lukeus was required to testify truthfully as part of that plea bargain, and it was within the jury's province to conclude that his plea bargain did not diminish his credibility. See *State v. Cameron*, 10th Dist.

No. 10AP-240, 2010-Ohio-6042, ¶38. Similarly, contrary to appellant's assertion, it was within the jury's province to conclude that Garrard's cooperation with the police and prosecution did not undermine his credibility. Id.

{¶36} Lastly, appellant argues that Lukeus and Garrard were not credible because of inconsistencies in their testimony and pre-trial statements to the police and prosecution. A defendant is not entitled to a reversal on manifest-weight grounds merely because inconsistent evidence was offered at trial, however. *State v. Crump*, 190 Ohio App.3d 286, 2010-Ohio-5263, ¶26. The trier of fact is free to believe or disbelieve any or all of the testimony presented. Id. Here, Lukeus and Garrard gave corroborating testimony implicating appellant in the shooting incident, and it was within the jury's province to find appellant guilty based on the corroborating testimony, even if it disbelieved other portions of their testimony.

{¶37} In the final analysis, the trier of fact is in the best position to determine witness credibility. *Cameron* at ¶43. The jury accepted evidence implicating appellant in the June 15, 2009 shooting, and appellant has not demonstrated a basis for disturbing the jury's conclusion. Accordingly, we hold that the jury's verdict was not against the manifest weight of the evidence. Having already rejected appellant's insufficiency claim, we overrule his third assignment of error.

{¶38} We next address appellant's second assignment of error, in which he asserts that we must reverse his convictions because the trial court failed to properly instruct the jury. We disagree.

{¶39} In his merit brief, appellant argued that the trial court erred by not instructing the jury that it must establish the guilt of the principal offender in order to

convict the complicitor. But appellant withdrew that argument in his reply brief, recognizing that there is no legal basis for that type of instruction. See R.C. 2923.03(B).

{¶40} Appellant also contends that the trial court erred by overruling his objection to the instruction indicating that "[f]light may be considered by you as consciousness of guilt." (Tr. 316.) Appellant claims that the instruction improperly placed a burden on him to explain why he fled the scene. Appellant's claim, however, is belied from the fact that the jury was instructed on appellant's right not to testify and that it should not consider appellant's decision not to testify for any purpose. See *State v. Morris*, 10th Dist. No. 05AP-1032, 2007-Ohio-2382, ¶74.

{¶41} Appellant also argues that the trial court erred by overruling his objection to an instruction stating, "[t]he defendant cannot be found guilty of complicity unless the offense was actually committed or attempted to be committed." (Tr. 326.) This instruction was a correct statement of the law, however. See R.C. 2923.03(C). Nevertheless, appellant asserts that the "attempted to be committed" language had the potential to confuse the jury. According to appellant, the instruction allowed the jury to convict appellant of aggravated robbery even if it found that the evidence merely proved an attempted aggravated robbery, which is an entirely different offense for which he was not even charged. That contention lacks merit, however, because we have already determined that the jury properly found him guilty of aggravated robbery based on the evidence.

{¶42} We now turn to appellant's challenges to the jury instructions raised on appeal but not in the trial court. Because appellant did not raise the challenges at trial, he forfeited all but plain error. See *State v. Horton*, 10th Dist. No. 03AP-665, 2005-

Ohio-458, ¶59. Plain error exists when there is error, the error is an obvious defect in the trial proceedings, and the error affects the outcome of the trial. *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68. A court recognizes plain error with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. Id.

{¶43} Appellant first contends that the trial court committed plain error by not instructing the jury that the prosecution had to prove he had a specific intent to kill Jenkins. We reject this contention because the trial court did, in fact, instruct the jury that the prosecution "must still prove beyond a reasonable doubt that the defendant specifically intended to cause the death of another." (Tr. 321.)

{¶44} Appellant also incorrectly claims that the trial court committed plain error by not advising the jury that a defendant is guilty under a complicity theory if he has the requisite mental element for the underlying offense. The trial court instructed the jury that, to find a defendant guilty of complicity, it must conclude that "the defendant solicited or procured another to commit the offense or aided or abetted another in committing the offense with the same knowledge or purpose as required by the offense." (Tr. 325.)

{¶45} Next, appellant contends that the trial court committed plain error by not providing definitions of the terms solicit and procure, as used in the complicity instruction. But we discern no plain error because the evidence established that appellant aided and abetted—and not solicited or procured—the crimes against Jenkins. In addition, appellant argues that the trial court committed plain error by not providing an instruction on the definition of attempt. Appellant claims that had the jury

been given the definition of attempt, it would have rejected the prosecution's theory that appellant was complicit in his accomplices' attempt to steal from Jenkins. But we have already determined that the jury properly found appellant guilty of aggravated robbery based on an attempted theft, and therefore, the trial court's failure to define attempt for the jury does not undermine that conviction.

{¶46} Appellant also argues that the trial court committed plain error by not informing the jury that the evidence must show that he had a purpose to act as a complicitor, but the trial court did, in fact, instruct the jury about the required "common purpose among two or more people to commit a crime" as well as what type of evidence establishes that common purpose. (Tr. 326.) We further reject appellant's assertion that the trial court committed plain error by not instructing the jury that a defendant's mere approval or acquiescence in a crime is not aiding and abetting. The evidence established that appellant took affirmative steps to contribute to the criminal acts against Jenkins; his conduct went beyond mere approval or acquiescence.

{¶47} Lastly, appellant contends that the trial court committed plain error when it failed to instruct the jury that the inference allowed on a defendant's purpose to kill is non-conclusive. Appellant raised this issue for the first time in the reply brief. A reply brief affords an appellant an opportunity to respond to an appellee's brief, however, and it is improper to use it to raise a new issue. *State v. McKinney*, 10th Dist. No. 08AP-23, 2008-Ohio-6522, ¶33. Accordingly, we decline to address the issue.

{¶48} To conclude, appellant has not established that we must reverse his convictions based on the jury instructions the trial court gave or failed to give. Therefore, we overrule his second assignment of error.

{¶49} Lastly, in his fourth assignment of error, appellant argues that his counsel rendered ineffective assistance. We disagree.

{¶50} The United States Supreme Court established a two-pronged test for ineffective assistance of counsel. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. First, the defendant must show that counsel's performance was outside the range of professionally competent assistance and, therefore, deficient. Id., 466 U.S. at 687, 104 S.Ct. at 2064. Second, the defendant must show that counsel's deficient performance prejudiced the defense and deprived the defendant of a fair trial. Id. A defendant establishes prejudice if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id., 466 U.S. at 694, 104 S.Ct. at 2068.

{¶51} Appellant first argues that his counsel was ineffective for not objecting to the jury instructions on complicity. But, for the reasons we have already stated, those jury instructions did not result in prejudice to appellant, and, therefore, appellant's counsel was not ineffective for failing to object to the instructions.

{¶52} Appellant also argues that his counsel was ineffective for not requesting an instruction on involuntary manslaughter as a lesser-included offense to aggravated murder. Failure to request instructions on lesser-included offenses is a matter of trial strategy, however, and does not establish ineffective assistance of counsel. *State v. Griffie*, 74 Ohio St.3d 332, 333, 1996-Ohio-71.

{¶53} Appellant further claims that his counsel was deficient for waiving his speedy trial rights for the period of continuances granted on October 14, 2009,

January 11, and March 10, 2010. Although appellant did not agree with his counsel's decision to waive speedy trial rights during these times, he was bound by the waiver, and his lack of consent does not provide grounds for an ineffective assistance of counsel claim. *State v. Hill*, 10th Dist. No. 09AP-398, 2010-Ohio-1687, ¶13. Moreover, the continuances were needed for purposes of trial preparation on the serious charges against appellant. This court has recognized that the waiver of speedy trial time is a matter of sound trial strategy when made for purposes of trial preparation. Id. at ¶15.

{¶54} In addition, we conclude that defense counsel did not render ineffective assistance by waiving appellant's speedy trial rights for the continuance granted on May 26, 2010. The continuance was due to defense counsel filing a motion to suppress, and this court has recognized that a motion to suppress tolls speedy trial time. *State v. Pilgrim*, 184 Ohio App.3d 675, 2009-Ohio-5357, ¶43.

{¶55} Next, appellant argues that his counsel was ineffective for not objecting to the trial court allowing J.P., C.G., H.M., and K.D. to be placed on the jury. In particular, appellant complains that J.P. was biased against him because she was a victim of a crime, however she indicated that she would not let that past event interfere with her obligation to decide appellant's case on the evidence presented at trial. Appellant also notes that J.P. said during voir dire that she would have trouble being a juror in a trial involving the murder of a child, but she was informed that this case involved an adult victim. Furthermore, appellant asserts that, during voir dire, H.M. failed to acknowledge that the prosecution would not have met its burden if it presented no believable witnesses. As the voir dire progressed, however, H.M. successfully demonstrated her understanding of the presumption of innocence and the prosecution's burden of proof.

Likewise, appellant contends that C.G. was not fit to be a juror because she said during voir dire that she would believe a witness who was sworn to tell the truth, but she later demonstrated an understanding of her role in assessing witness credibility. Appellant also claims that K.D. should not have been placed on the jury because she revealed her predisposition against a person being accused of a violent crime when she expressed a fear that she might faint during trial if exposed to gory pictures. She said, however, that she would not allow the pictures to influence her improperly as a juror and that she would not hold it against appellant if she were shown gory pictures. Thus, the trial court did not err by allowing J.P., C.G., H.M., and K.D. to be placed on the jury, and, therefore, appellant's counsel was not required to object to those jurors. See *State v. Pariscoff*, 10th Dist. No. 09AP-848, 2010-Ohio-2070, ¶37.

{¶56} Appellant further contends that his defense counsel should have requested a mistrial or asked the trial court to remove all male jurors after T.S. revealed that, during a recess, he was outside the courtroom with another male juror when he heard two women talking about how Garrard was lying. He similarly claims that his counsel should have objected to the trial court's failure to either remove the jurors sua sponte or grant a new trial based on T.S.'s allegations. Appellant's claims lack merit, however, because the other male jurors denied hearing any comments about the case from people while outside the courtroom, and those other jurors stated that they remained fair and impartial.

{¶57} Appellant additionally challenges his counsel's failure to request a hearing on his allegation that a female juror revealed her bias against him, and he claims that his counsel should have objected to the trial court's failure to sua sponte hold that

hearing. We cannot address those arguments on this record because they require speculation on what witnesses would say in a hearing held to address appellant's allegation. See *State v. McClurkin*, 10th Dist. No. 08AP-781, 2009-Ohio-4545, ¶61, quoting *State v. Lewis*, 10th Dist. No. 04AP-1112, 2005-Ohio-6955, ¶35-36 (noting that an appellate court's direct review of an ineffective assistance claim is limited to the record and cannot be based upon speculation). And because the issue has not been developed in the record, we need not address appellant's claim that his counsel was ineffective for not objecting to the trial court's failure to grant a new trial after learning about the allegations concerning the female juror.

{¶58} Appellant also claims that his defense counsel should have objected to the trial court only administering the oath of service to those selected to serve on the jury and not also on all of the prospective jurors at the beginning of voir dire. But appellant cannot establish prejudice from that claim because there is no evidence that any improper conduct occurred before the oath was administered. Appellant similarly asserts that his defense counsel should have objected to the trial court's failure to admonish all prospective jurors against misconduct, but there is no evidence in the record establishing misconduct from those prospective jurors who did not hear the admonition. Appellant argues that his defense counsel was ineffective for failing to object to the trial court not replacing T.S. until deliberations began, but the record shows that T.S. was replaced before deliberations. Lastly, appellant claims that defense counsel was ineffective for not objecting to the trial court's failure to have a sufficient number of prospective jurors for voir dire. Appellant establishes no basis for that

objection, however, especially given that he was afforded his right to be tried by 12 jurors, in compliance with Crim.R. 23(B).

{¶59} For all these reasons, we conclude that appellant's counsel did not render ineffective assistance. Therefore, we overrule his fourth assignment of error.

{¶60} In summary, we overrule appellant's four assignments of error. We affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK and CONNOR, JJ., concur.