[Cite as *State v. Clinkscale*, 2011-Ohio-6385.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 10AP-1123
v.	:	(C.P.C. No. 97CR-09-5339)
David B. Clinkscale,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 13, 2011

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellee.

Eric J. Allen, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶1} Defendant-appellant, David B. Clinkscale ("appellant"), appeals the judgment of the Franklin County Court of Common Pleas, which convicted him of charges pertaining to a September 1997 shooting that injured Todne Williams and killed her husband, Kenneth Coleman. For the following reasons, we affirm.

I. BACKGROUND

{¶2} Appellant was charged on the following counts: aggravated murder of Coleman (with prior calculation); aggravated murder of Coleman (during an aggravated burglary); aggravated murder of Coleman (during an aggravated robbery); attempted aggravated murder of Williams; kidnapping of Williams; aggravated robbery of Coleman and Williams; and aggravated burglary on the home of Coleman and Williams. The aggravated murder counts included death penalty specifications, and all counts included firearm specifications.

{¶3} Appellant was tried to a jury in 1998. At the time, appellant had the assistance of a publicly-funded investigator and two publicly-funded attorneys. Appellant was acquitted of the aggravated murder by prior calculation count, but convicted on all other counts and accompanying specifications. The trial court did not impose the death penalty, but sentenced appellant to prison instead. This court affirmed, and the Supreme Court of Ohio declined review. *State v. Clinkscale* (1999), 10th Dist. No. 98AP-1586; *State v. Clinkscale* (2000), 88 Ohio St.3d 1482. The United States Sixth Circuit Court of Appeals granted appellant federal habeas relief, however. *Clinkscale v. Carter* (C.A.6, 2004), 375 F.3d 430, 446.

{¶4} In 2006, appellant was retried and convicted on all counts and specifications on which he was previously convicted. Prior to the second trial, appellant had the assistance of a publicly-funded investigator. Also, two attorneys had been appointed for appellant, but they were eventually replaced by two retained counsel. The trial court sentenced appellant to prison, but his convictions were reversed in *State v. Clinkscale*, 122 Ohio St.3d 351, 2009-Ohio-2746.

{¶5} In 2010, another jury trial was held on the counts and specifications on which appellant was previously convicted. The court appointed two new attorneys to represent appellant. The court also approved funding for investigative services. The appointed attorneys were subsequently replaced by counsel retained by appellant's family. On August 11, 2010, appellant's new attorney requested funding for investigative services because "[t]here are several witnesses that need to be interviewed and likely will be called at trial." The court denied the request.

{¶6} At trial, Williams testified as follows. In September 1997, Williams and Coleman were living at 1261 Mooberry Street in Columbus, Ohio. Coleman kept a dog for dog-fighting. He also gambled large amounts of money, and he kept cash in a bedroom safe. Appellant and Coleman met each other while they were growing up in Youngstown, Ohio, and they became friends. Appellant's nickname is "Silk." (Tr. Vol. I, 95.)

{¶7} During the weekend of September 6, 1997, Coleman and a group of people went to Kentucky for a dog fight. At trial, Williams identified appellant as one of the men in the group. Coleman, appellant, and another man, later known to Williams as Darry Woods ("Darry"), returned to the Mooberry house on September 7, 1997 around 11:00 p.m. The men played video games, and Williams went upstairs to be with her children. At one point, Coleman came upstairs to get some money because he was gambling on a video game. Later, Williams heard a gunshot, and, within seconds, appellant came to her bedroom with a nine-millimeter gun, which had "smoke coming out of it." (Tr. Vol. I, 122.) Appellant was in a rage and demanded money. Williams told appellant to talk to Coleman, but appellant said he could not do that. Next, Darry

came into the room and held the gun on Williams while appellant carried out a safe from the closet. Appellant returned and told Williams to go downstairs. Appellant ordered Williams to lie next to Coleman, but Williams tried to escape and then began struggling with appellant. Appellant fired three shots at Williams. Williams tried to block the shots with her arms, and one of the shots shattered a bone in one of her arms. Williams called 911 after appellant and Darry left. When the 911 operator asked who the shooter was, Williams said, " 'I don't know.' " (Tr. Vol. I, 195.) But Williams explained at trial that she was scared and focused on getting help.

{¶8} Detective Timothy Huston testified that he was a patrol officer on September 8, 1997, when he and Officer Brian Kaylor responded to the shooting scene. He also testified as follows. He and Kaylor arrived at the scene around 4:00 a.m., which was less than one minute from when they were dispatched there. Williams said that the attackers were two black males and that she had previously seen one of them with Coleman. Kaylor testified that Williams was hysterical when he and Huston arrived at the scene. He also said, "I recall her saying * * * she did not know the shooter." (Tr. Vol. IV, 726.)

{¶9} Detective Robert Viduya investigated the shooting and testified as follows. Williams told him that the shooter's first name was David and that Coleman's mother would know his full name. Viduya called Coleman's mother, and she told him that David Clinkscale was the name of her son's friend. Viduya showed Williams a photograph of appellant, and Williams said, " 'Hey, that's the shooter. That's David.' " (Tr. Vol. IV, 662.) Williams identified Darry in a photo array as appellant's accomplice. She had previously identified other individuals as appellant's accomplice, but she was not as

certain about those other identifications as she was with the one she made of Darry. She said she was " 'a hundred percent sure' " of her identification of Darry. (Tr. Vol. IV, 702.)

{¶10} Larry Tate, a former deputy coroner, testified that Coleman died as a result of a gunshot wound to his head. Mark Hardy, a forensic scientist for the police department, testified that four spent nine-millimeter gun shell casings found at the scene were fired from the same semiautomatic weapon. Dr. Raman Tejwani and Debra Lambourne, also forensic scientists, testified that appellant's DNA was on a ball cap found at the scene.

{¶11} Rhonda Cadwallader, a fingerprint examiner for the police department, testified as follows. Appellant's fingerprints were on a Playstation Game Day '98 booklet found at the scene of the shooting, and his thumbprint was on a video game controller found at the scene. The thumbprint "pops up because it still had moisture * * *. There was still perspiration." (Tr. Vol. III, 525.) Also, "there was no evaporation of the perspiration. And that's why the lines are so dark and so complete." (Tr. Vol. III, 525.) Cadwallader could not give an exact age of the thumbprint, and she indicated that the print could have been left there a number of days before or longer. But she testified, "I just know from my training and my experience and looking at latent prints every day that a print this dark and detailed is one that had not been there for a while." (Tr. Vol. III, 525.) In addition, she said, based on her training and experience, "I can tell the difference between a print that was newly deposited rather than a print that had exhibited some deterioration. In my opinion, this print did not exhibit any deterioration at all. It had clear ridge detail. It wasn't blurred or distorted. So, in my opinion that was

newly deposited." (Tr. Vol. III, 549.) She also said that there were no other prints superimposed over the print, and, therefore, it is reasonable to conclude that appellant was the last person to touch the controller.

{¶12} Next, the prosecution introduced the following testimony of appellant from his first trial. Appellant and a man he referred to as Jerome Woods drove from Youngstown to Columbus in September 1997 to visit Coleman. During that visit, the group went to Kentucky for a dog fight. After the fight, appellant drove back to Columbus with Jerome. Coleman was in a separate car, and appellant never saw him again. It was now September 7, 1997, and appellant and Jerome spent some time in Columbus before returning to Youngstown later that day. In Youngstown, appellant went to the home of his cousin, Bryan Fortner, to watch a football game. Appellant slept with his girlfriend, Rhonda Clark, at Fortner's house. He went to his parents' home around 5:30 a.m. the next morning.

{¶13} During his testimony, appellant verified that his nickname is "Silk." (Tr. Vol. V, 900.) He also admitted that the blue ball cap found at the scene was his. He claimed that he left it in Kentucky, and Coleman must have brought it to Columbus.

{¶14} Rhonda Parker testified as follows. She had dated appellant before she married another man. She was not with appellant on September 7 or 8, 1997. In fact, she did not even meet him until a couple of weeks later. Nevertheless, appellant asked Parker to tell police that she was with him watching football and sleeping together on the night of the shooting, and she conveyed that story to an investigator for the defense. When a police detective interviewed her later, however, she said that she was not with appellant on the night of the shooting and did not even know him then. She also

refused to support the alibi in 2000 when a defense attorney contacted her. She told the attorney that she would not lie.

{¶15} The trial court did not allow defense counsel to cross-examine Parker with questions regarding the fact that her husband, whom she met in February 1999, was on federal parole from 1996 to 2001 and was convicted for selling drugs between September 2004 and September 2006 at a beauty supply shop he and Parker owned. The court also prohibited defense counsel from questioning Parker on whether she was cooperating with the prosecution to appease law enforcement after property in her shop was confiscated in a raid related to the prosecution of her husband for drug trafficking. The court concluded that any relevance of the information appellant wanted to elicit was "overwhelmingly outweighed by the prejudicial effect." (Tr. Vol. V, 1020.) The court allowed defense counsel to question Parker generally about whether she expected to benefit from testifying, but counsel did not do so.

{¶16} After the prosecution rested its case-in-chief, the defense called Arthur Clinkscale, appellant's father, who testified that appellant came to his home at 5:45 a.m. on September 8, 1997, and that at some point in 1998, an investigator for the defense interviewed Parker and Fortner. Next, Darry testified as follows on appellant's behalf. Appellant referred to Darry by the name "Jerome." (Tr. Vol. VI, 1207.) Appellant and Darry lived in Youngstown, and they visited Coleman in Columbus during the early part of September 1997. After the visit, on September 7, 1997, they were back in Youngstown around 6:00 or 6:30 p.m. Later that night, Darry went to Fortner's house to watch a football game, and appellant was at the house, too. Darry left the house around 9:30 or 10:00 p.m. Although Darry maintains his innocence, he pleaded guilty to

a charge pertaining to the shooting. He wrote a letter to a judge seeking judicial release. In the letter, he said that his family and the victim's family had suffered because of his inability to " 'make the proper decision at the proper time.' " (Tr. Vol. VI, 1260.) Lastly, Darry testified that, although he did not know of Fortner's whereabouts, Fortner's mother has seen him.

{¶17} During closing argument, the prosecutor asked, "Wouldn't it have been a better alibi to have [appellant's] mom testify, too? Maybe mom wouldn't." (Tr. Vol. VII, 1342.) Defense counsel objected, and the trial court overruled it. The prosecutor also asked, "Did you hear anything about * * * Fortner? He was the front end of the alibi * * *. He came to that meeting at the parents, but where is he today?" (Tr. Vol. VII, 1351.) Defense counsel objected, and the trial court sustained the objection.

{¶18} In addition, the prosecutor stated, without objection, "The fingerprint on the controller, what did Rhonda Cadwallader tell you? Not just it's [appellant's] print. She told you it was fresh. * * * She told you there - - a fingerprint is 95 percent water. No evaporation had occurred." (Tr. Vol. VII, 1337-38.) Furthermore, the prosecutor said, without objection, that appellant, Darry, and Fortner were "thick as thieves" and that they were "buds" and "like brothers." (Tr. Vol. VII, 1347-48.)

{¶19} As part of its general charge to the jury, the court said that closing arguments "are not evidence." (Tr. Vol. VII, 1356.) After deliberation, the jury found appellant guilty of the charges and specifications.

{¶20} Appellant filed a motion for a new trial. Appellant claimed that the prosecutor committed misconduct by commenting on the failure of appellant's mother to testify. He also claimed that the trial court erred by not providing funding for a private

investigator to find Fortner and for limiting the cross-examination of Parker. Appellant attached to his motion an affidavit of Gary Phillips, an investigator. Phillips noted that he started providing investigative services, at the request of appellant's private counsel, until the court denied funding. Phillips claimed that a search for Fortner would have required more time and expense.

{¶21} The prosecution objected to appellant's motion. Regarding appellant's claim that he needed a publicly-funded investigator to help him find Fortner, the prosecutor noted that Fortner's mother was in the courtroom and that the investigator retained by the defense had been present for the whole trial. The court said that appellant failed to show a need for an investigator and that it was "pretty unlikely" there would be any witnesses who had not already testified in the previous two trials. (Tr. Vol. VIII, 1472.) The court also recognized that the defense hired an investigator. The court denied appellant's motion for a new trial and sentenced him to prison.

II. ASSIGNMENTS OF ERROR

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

> [1.] THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO FIND THE DEFENDANT INDIGENT AND PROVIDE FUNDING FOR AN INVESTIGATOR.
>
> [2.] THE TRIAL COURT ERRED IN NOT PROVIDING FUNDS FOR A PRIVATE INVESTIGATOR IN VIOLATION OF APPELLANT'S RIGHT TO DUE PROCESS UNDER THE FIFTH AMENDMENT TO THE FEDERAL CONSTITUTION AND HIS SIXTH AMENDMENT RIGHT TO COUNSEL UNDER THE SIXTH AMENDMENT BOTH MADE APPLICABLE TO THE STATES BY THE FOURTEENTH AMENDMENT.
>
> [3.] THE STATE OF OHIO ENGAGED IN NUMEROUS INSTANCES OF PROSECUTORIAL MISCONDUCT, THE

> CUM[U]LATIVE EFFECT DENIED THE APPELLANT OF DUE PROCESS AS GUARANTEED BY THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION MADE APPLICABLE TO THE STATES BY THE FOURTEENTH AMENDMENT.
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> [4.] THE CONVICTIONS IN THIS MATTER WERE NOT SUPPORTED BY SUFFICIENT EVIDENCE IN VIOLATION OF APPELLANT[']S FIFTH AMENDMENT RIGHT TO DUE PROCESS MADE APPLICABLE TO THE STATES BY THE FOURTEENTH AMENDMENT OF THE FEDERAL CONSTITUTION.
>
> [5.] THE TRIAL COURT VIOLATED THE APPELLANT'S RIGHT TO CONFRONTATION GUARANTEED BY THE SIXTH AMENDMENT TO THE FEDERAL CONSTITUTION[ ] MADE APPLICABLE TO THE STATES BY THE FOURTEENTH AMENDMENT BY NOT ALLOWING COUNSEL TO FULLY CROSS EXAMINE RHONDA PARKER ABOUT HER HUSBAND'S DRUG DEALING ENTERPRISE.
>
> [6.] THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT ALLOWED TESTIMONY FROM RHONDA [CADWALLADER] REGARDING THE FRESHNESS OF A FINGERPRINT IN VIOLATION OF DAUBERT V[.] DOW PHARMACE[U]TICALS ADOPTED BY THE OHIO SUPREME COURT IN MILLER V[.] BIKE ATHLETIC.
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> [7.] THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT OVERRULED [APPELLANT'S] MOTION FOR A NEW TRIAL.

III. DISCUSSION

A. First and Second Assignments of Error

{¶23} In his first and second assignments of error, appellant argues that we must reverse his convictions because the trial court denied his August 11, 2010 request for a publicly-funded investigator. We disagree.

{¶24} The Supreme Court of Ohio has recognized that, pursuant to R.C. 2929.024, an indigent defendant in an aggravated murder case is entitled to publicly-funded investigative services that are " 'reasonably necessary.' " *State v. Mason*, 82 Ohio St.3d 144, 150, 1998-Ohio-370. In determining whether to provide funding for an investigator, the court considers the value of the investigative assistance and " 'the availability of alternative devices that would fulfill the same functions.' " Id., quoting *State v. Jenkins* (1984), 15 Ohio St.3d 164, paragraph four of the syllabus. The decision to provide a publicly-funded investigator is made " 'in the sound discretion' " of the trial court. *Mason* at 150, quoting *Jenkins*, paragraph four of the syllabus. An abuse of discretion connotes more than an error of law or judgment; it entails a decision that is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶25} Appellant claims that he is indigent and that, although he retained private counsel, he lacked sufficient means to pay for an investigator. To be sure, the fact that a defendant "has only the available funds to retain counsel * * * should not preclude the finding of indigency." *State v. Cham*, 10th Dist. No. 05AP-1288, 2007-Ohio-378, ¶19. Notwithstanding the issue of appellant's indigence, he has not demonstrated that the trial court abused its discretion when it denied his request for a publicly-funded investigator.

{¶26} When appellant filed the August 11, 2010 motion, he made a general claim that "[t]here are several witnesses that need to be interviewed and likely will be called at trial." It was reasonable for the trial court to deny that motion because appellant already had the benefit of two publicly-funded investigators for his first two

trials and one publicly-funded investigator for his third trial. This is in addition to appellant having received assistance from eight former attorneys.

{¶27} Although appellant subsequently claimed that he needed a publicly-funded investigator to help him find his alibi witness, Fortner, he did not make this assertion in his August 11, 2010 motion. In any event, the record does not support that claim. The defense could have talked to Fortner's mother, who was in the courtroom during trial, and who, according to Darry, had seen Fortner. Appellant's privately-retained investigator was in the courtroom during the trial, so he was available to the defense at that time. And, even if Fortner were called to provide alibi testimony for appellant, the jury easily could have rejected that testimony because Parker indicated that the alibi was fabricated.

{¶28} For all these reasons, we conclude that the trial court did not abuse its discretion when it denied appellant's August 11, 2010 request for a publicly-funded investigator. Therefore, we overrule appellant's first and second assignments of error.

B. Fourth Assignment of Error

{¶29} We next address appellant's fourth assignment of error, in which he contends that his convictions are based on insufficient evidence because Williams was not credible. Questions of witness credibility are irrelevant to the issue of whether there is sufficient evidence to support a conviction, however. *State v. Ruark*, 10th Dist. No. 10AP-50, 2011-Ohio-2225, ¶21. "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 *State v. Jenks*

(1991), 61 Ohio St.3d 259, paragraph two of the syllabus, and *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶79. Thus, appellant has not raised a proper sufficiency challenge.

{¶30} In any event, not only was Williams' testimony alone sufficient to support appellant's convictions, other evidence also connects him to the shooting. Williams testified that appellant used a nine-millimeter gun during the shooting, and Hardy testified that there were four spent nine-millimeter gun shell casings found at the scene. Appellant's DNA was on a hat found at the scene, and his fingerprints were on a game controller and booklet. Lastly, Parker established that appellant created a false alibi, and this shows his consciousness of guilt. See *State v. Issa*, 93 Ohio St.3d 49, 67, 2001-Ohio-1290. Therefore, we conclude that appellant's convictions are based on sufficient evidence. Accordingly, we overrule appellant's fourth assignment of error.

C. Fifth Assignment of Error

{¶31} In his fifth assignment of error, appellant argues that the trial court erred by limiting his cross-examination of Parker. On direct examination, Parker testified that she received no benefit for testifying, other than mileage reimbursement and a lunch voucher. On cross-examination, defense counsel attempted to ask Parker whether her husband, Benjamin Parker, who had been indicted in a federal case for trafficking drugs from a business they owned, would benefit from her testimony. The prosecutor objected, contending that the question of benefit to Parker's husband was purely speculative, lacked a good-faith basis, and would be prejudicial.

{¶32} Defense counsel also sought to question Parker about a connection between the timing of her decision to testify for the defense and her husband's

indictment and prosecution. Again, the prosecutor objected based on speculation and relevance.

{¶33} As to whether defense counsel could ask Parker about a possible benefit to her husband, the court said that the request was based on "total speculation" and counsel had no "reason to believe that her husband is getting anything from the feds. Certainly isn't getting anything from the County Prosecutor's Office." (Tr. Vol. V, 1013.) Defense counsel said that such a deal could occur, but offered no basis for believing that it had occurred in this case. The court ruled that defense counsel could ask Parker "in general if she expects to get anything," but not about her husband because "that's prejudicial." (Tr. Vol. V, 1014.)

{¶34} The court allowed no testimony regarding a possible connection between her husband's prosecution and her decision to testify. The court said: "If it has any relevance, it would be very little and overwhelmingly outweighed by the prejudicial effect." (Tr. Vol. V, 1020.) Defense counsel did not follow up with any related questions to Parker.

{¶35} Trial courts have wide latitude to impose reasonable limits on the scope of cross-examination based upon concerns for harassment, prejudice, confusion of the issues, and repetitive, marginally-relevant interrogation. *State v. Foust*, 2d Dist. No. 20470, 2005-Ohio-440, ¶14, citing *Delaware v. Van Arsdall* (1986), 475 U.S. 673, 106 S.Ct. 1431. Evid.R. 403(A) provides that, "[a]lthough relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice." The Supreme Court of Ohio has defined unfair prejudice as "that quality of evidence which might result in an improper basis for a jury decision." *State v. Crotts*,

104 Ohio St.3d 432, 2004-Ohio-6550, ¶24. "When considering evidence under Evid.R. 403, the trial court is vested with broad discretion and an appellate court should not interfere absent a clear abuse of that discretion." *State v. Allen*, 73 Ohio St.3d 626, 633, 1995-Ohio-283, citing *State v. Morales* (1987) 32 Ohio St.3d 252.

{¶36} Evid.R. 607(A) expressly allows any party to attack the credibility of a witness. Evid.R. 607(B), however, requires a questioner to have a reasonable basis for asking an impeachment-related question that implies the existence of an impeaching fact.

{¶37} In his brief, appellant directs us to documents submitted to the trial court with his motion for new trial. They include the November 2007 indictment against Parker's husband, Parker's agreement to withdraw her claim to seized weapons, and a motion indicating that Benjamin Parker pleaded guilty to the indicted charges in May 2008. Appellant argues, "It is not a stretch that Rhonda Parker's motivation in testifying for the State of Ohio was to stay in the good graces of law enforcement following a major raid on her business, which she still owns." We disagree.

{¶38} At trial, defense counsel offered no specific information about the federal prosecution and its connection to Parker's testimony about whether appellant was with her on the night of the murder in 1997. Counsel could only speculate as to how Parker's testimony in 2010 in the state case could benefit her husband, who pleaded guilty to the federal charges in 2008 and was presumably serving a prison term in 2010 for crimes committed in 2004 to 2006. Parker had already been asked on direct examination whether she was receiving a benefit for testifying, a question the court interpreted to include any indirect benefit she might receive through her husband.

Although the court permitted defense counsel to pursue further questioning in that regard, counsel did not do so. The trial court did not err by limiting defense counsel's cross-examination questions about benefits.

{¶39} Nor did the trial court err by denying defense counsel's request to question Parker about a possible connection between her husband's federal prosecution and the timing of her decision to testify for the prosecution in this case. The prosecution and the defense questioned Parker extensively about her initial statements to an investigator, her refusal (at least by 2000) to maintain the alibi, her eventual decision to testify for the prosecution, and her reasons for changing her story. Parker testified that she was married to Benjamin Parker by the time police arrived at her door to question her and admitted that she and Benjamin wanted to avoid having contact with police. We agree with the trial court that, whatever marginal benefit counsel's additional questioning could have provided, it was outweighed by the prejudice and confusion the irrelevant testimony about Benjamin Parker's criminal past could cause.

{¶40} In the end, we conclude that the trial court did not abuse its discretion by limiting defense counsel's cross-examination of Parker. Therefore, we overrule appellant's fifth assignment of error.

D. Sixth Assignment of Error

{¶41} In his sixth assignment of error, appellant argues that the trial court committed plain error when it allowed Cadwallader to testify that a thumbprint was newly-deposited on the game controller found at the scene. We disagree.

{¶42} Appellant asserts that Cadwallader's testimony about the thumbprint was inadmissible because the trial court did not hold a hearing to determine whether it was

relevant and reliable, pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993), 509 U.S. 579, 113 S.Ct. 2786. Appellant did not raise this issue in the trial court, and therefore, he forfeited all but plain error. "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Crim.R. 52(B). 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. Using the plain error standard, we now turn to the merits of appellant's claim against Cadwallader's testimony.

{¶43} The Supreme Court of Ohio has held that, "[w]ithout a defense objection, the trial court was not obligated to conduct a hearing on the relevance and reliability" of testimony about fingerprint evidence. *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, ¶140. In any event, appellant has not demonstrated that the trial court would have excluded Cadwallader's testimony had it held a *Daubert* hearing. Cadwallader's testimony was relevant because it connected appellant to the shooting. Furthermore, Cadwallader's testimony was based on her experience and expertise, and there is nothing in the record to establish that her testimony was unreliable. See *State v. Jackson*, 10th Dist. No. 02AP-867, 2003-Ohio-6183, ¶36 (declining to disturb a trial court's decision to allow expert testimony because the record did not establish the unreliability of the testimony). In fact, the Supreme Court of Ohio has previously upheld the admission of testimony about the age of fingerprints left on an object. *State v. Davis* (1978), 56 Ohio St.2d 51, 57.

{¶44} Accordingly, we conclude that the trial court did not commit plain error by failing to hold a *Daubert* hearing before allowing Cadwallader to testify about the age of the thumbprint on the video game controller found at the scene. Therefore, we overrule appellant's sixth assignment of error.

E. Third Assignment of Error

{¶45} We next address appellant's third assignment of error, in which he asserts that we must reverse his convictions because the prosecutor committed misconduct during closing argument. We disagree.

{¶46} The test for prosecutorial misconduct is, first, whether the conduct is improper, and second, whether the conduct prejudicially affected the substantial rights of the accused. *State v. Saleh*, 10th Dist. No. 07AP-431, 2009-Ohio-1542, ¶66. The prosecutor's conduct cannot be grounds for a new trial unless the conduct deprives the defendant of a fair trial. *State v. Keenan* (1993), 66 Ohio St.3d 402, 405.

{¶47} First, appellant argues that the prosecutor committed misconduct by commenting on the fact that his mother did not testify. But it is not improper for the prosecutor to comment that a witness, other than the accused, did not testify. *State v. Clemons*, 82 Ohio St.3d 438, 452, 1998-Ohio-406.

{¶48} Next, appellant contends that the prosecutor's comment about Fortner's absence caused him prejudice. Appellant's argument fails, however, given *Clemons*. And, in any event, the trial court sustained an objection to the comment and instructed the jury that closing arguments are not evidence.

{¶49} Appellant also argues that the prosecutor committed misconduct by stating that appellant, Fortner, and Darry were "thick as thieves." (Tr. Vol. VII, 1347.)

Because appellant did not object to the comment, he forfeited all but plain error. See *State v. Williams*, 79 Ohio St.3d 1, 12, 1997-Ohio-407. Prosecutorial misconduct allows for a reversal under the plain error standard if it is clear that the defendant would not have been convicted in absence of the improper conduct. *Saleh* at ¶68. Here, the prosecutor's "thick as thieves" comment was merely part of a broader argument that appellant (1) perpetrated the shooting with the help of Darry, and (2) used Fortner as part of a fabricated alibi. Given this context, we need not conclude, under plain error, that the prosecutor's "thick as thieves" comment constituted misconduct.

{¶50} Lastly, appellant claims that the prosecutor committed misconduct by asserting that the thumbprint on the game controller was "fresh" and that "a fingerprint is 95 percent water." (Tr. Vol. VII, 1337.) Appellant did not object to the statements and therefore, forfeited all but plain error. *Williams* at 12. We have already concluded that it was not plain error for Cadwallader to testify about the newness of the thumbprint, and this testimony supported the prosecutor's statement that the print was "fresh." The prosecutor's statement that a fingerprint is 95-percent water was part of her argument about the newness of the thumbprint on the controller, but Cadwallader had not testified about that figure. Nevertheless, Cadwallader had testified about the moisture in the print, the lack of evaporation, and the lack of deterioration, all of which supported the prosecutor's arguments about the newness of the print anyway. Under the plain error standard, we conclude that the prosecutor did not commit misconduct by stating that the print on the controller was "fresh" and that a "fingerprint is 95 percent water."

{¶51} For all these reasons, we overrule appellant's third assignment of error.

F. Seventh Assignment of Error

{¶52} Lastly, we address appellant's seventh assignment of error, in which he asserts that the trial court abused its discretion by denying his motion for a new trial. We disagree.

{¶53} We review the denial of a motion for new trial under an abuse of discretion standard. *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, ¶82. To support his motion for a new trial, appellant argued that (1) the trial court erred by denying his request for a publicly-funded investigator and by limiting the cross-examination of Parker, and (2) the prosecutor committed misconduct during closing argument by commenting on the failure of appellant's mother to testify. Given that we have already rejected those arguments, we hold that the trial court did not abuse its discretion by denying appellant's motion for a new trial. Therefore, we overrule appellant's seventh assignment of error.

IV. CONCLUSION

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

Judgment affirmed.

BRYANT, P.J., and SADLER, J., concur.