[Cite as *State v. Maynard*, 2012-Ohio-2946.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 11AP-697 (C.P.C. No. 10CR-05-3189)
John E. Maynard,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 28, 2012

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

Shannon M. Treynor, for appellant.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶ 1} Defendant-appellant, John E. Maynard ("appellant"), appeals from a judgment entry of conviction entered by the Franklin County Court of Common Pleas following a jury trial in which he was convicted of murder, aggravated robbery, aggravated burglary, felonious assault, and the accompanying firearm specifications. For the following reasons, we affirm that judgment.

I. Facts and Procedural Background

{¶ 2} On May 27, 2010, appellant was indicted in connection with the 2003 murder of David Daniels ("Daniels"), who was shot and killed during a home invasion in which the offenders planned to rob a drug dealer, James Davis ("Davis"), living at a duplex on North Princeton Avenue in Columbus, Ohio. Davis, also known as "Fat Jim," was shot at the scene, but survived his injuries.

{¶ 3} On April 14, 2011, a hearing was held on appellant's motion to suppress identification. Although a formal ruling was not issued, the trial court, in essence, denied the motion, stating that the issues with the photo array and the identification went to the weight of the evidence, not its admissibility at trial. A jury trial commenced on April 18, 2011. The following testimony and evidence was established.

{¶ 4} In April 2003, David Greenberg ("Greenberg") and several other individuals hatched the plan to rob Davis at his duplex, located at 65 North Princeton Avenue. In the beginning, Stacy Nichols ("Nichols") and her stepfather, Jimmy Clark ("Clark"), approached Greenberg about the robbery. Greenberg and Nichols knew each other from the neighborhood and had previously slept together on a few occasions. Clark eventually backed out of the robbery. Greenberg then recruited Charles Danko ("Danko") to assist in the robbery. Greenberg and Danko had previously worked together for a tree-trimming company. Danko was also dating Greenberg's former girlfriend, Angie Davis. Danko recruited appellant to help with the robbery. Danko and Greenberg both knew appellant because appellant and Angie Davis are cousins. In addition, appellant recruited a fifth person, his half-brother, whose full name was unknown but who was referred to throughout the trial as either "James" or "Jason."

{¶ 5} The plan was for Danko to be the "get up" driver who would drive Greenberg, appellant, and appellant's half-brother James to the duplex. Danko was to drop the three men off in front of the duplex and drive away. Greenberg, appellant, and James would be the "inside" guys who would go inside the duplex and steal the money and drugs. Greenberg was armed with a 9 mm handgun, appellant had a club or a stick, and James may have also had a handgun. Upon stealing the money and drugs, Greenberg, appellant, and James were to exit out the back door of the duplex. Nichols was to be the "get-away" driver, who would be waiting in the alley behind the duplex to drive everyone away from the scene.

{¶ 6} On April 15, 2003, Danko drove the three "inside" guys past the duplex prior to the robbery. They observed Daniels exit the residence on the right side (65 North Princeton Avenue) and enter the residence on the left side (63 North Princeton Avenue). Several other individuals also entered the residence. At that point, the plan changed and the target became 63 North Princeton Avenue, rather than 65 North Princeton Avenue.

{¶ 7} The three "inside" guys approached the duplex. "Fat Jim" saw them approaching and attempted to prevent entry. Greenberg was the only one of the three who was able to force his way inside. Once inside, Greenberg saw Daniels standing behind "Fat Jim" with a gun. Greenberg and Daniels struggled over the gun. During the struggle, Greenberg heard a gunshot. Believing it was fired from Daniels' gun, Greenberg shot Daniels twice. Greenberg then continued firing until he "emptied the clip," killing Daniels. (Tr. 220.) "Fat Jim" also sustained multiple bullet wounds, but he survived those injuries.[1] However, Greenberg was uncertain as to exactly how "Fat Jim" was injured. When Greenberg removed the gun from Daniels' hand, he discovered Daniels' weapon had not been loaded. Therefore, Greenberg realized the initial gunshot must have come from somewhere outside. Greenberg also realized he had suffered a gunshot wound to the knee and concluded he had somehow shot himself through the knee while shooting at Daniels.

{¶ 8} Greenberg grabbed a couple of bags from the table and headed for the back door but was unable to unbolt the deadlocks. Panicking, he exited the front door instead and fell down the steps as a result of his gunshot wound. Greenberg scooped up the contents of the bags, which had broken loose during the fall, and began limping toward the side and the back of the duplex. He ran into appellant and James, who helped carry him to the get-away car where Nichols was waiting. Nichols drove the car to her house. Greenberg, appellant, and James then went to another house a short distance away. Danko eventually arrived as well. After a while, appellant drove Greenberg back to Greenberg's residence.

{¶ 9} When the first responding officers arrived at the North Princeton Avenue duplex, they found Davis on the couch. Despite suffering multiple gunshot wounds, he was still responsive. He advised the officers that the shooter was a man named Greg Daniels, who lived next door. However, officers were unable to locate anyone next door.

{¶ 10} On April 18, 2003, Greenberg was arrested by SWAT officers at his residence. Greenberg was subsequently indicted for aggravated murder with the death penalty specification, as well as on other charges. Eventually, Greenberg reached an

[1] Davis, aka "Fat Jim" did not testify at trial. According to the opening statement provided by the prosecution at trial, Davis died of unrelated causes prior to the trial.

agreement with plaintiff-appellee, State of Ohio ("the State"), whereby he pled guilty to murder and felonious assault and received a sentence of 15 years to life. As part of his plea deal, Greenberg made a proffer statement in which he revealed the names of the others who had participated and their respective roles in the home invasion. Therefore, as part of his plea deal, Greenberg implicated Nichols, Danko, appellant and James.

{¶ 11} In 2006, Greenberg identified photos of Nichols and Danko. However, when shown a black-and-white photo array that included appellant's photo, he was unable to identify him. He had also been shown another photo array containing a photograph of another John Maynard, but he did not identify anyone. Later, in 2010, Greenberg was shown a color photo array containing the same photographs as those displayed in the 2006 array and he identified appellant. Additionally, in 2011, at the trial, Greenberg made an in-person identification of appellant as one of the "inside" guys.

{¶ 12} Following Greenberg's proffer, Nichols and Danko were both subsequently indicted for murder, aggravated robbery, aggravated burglary, and felonious assault.

{¶ 13} Nichols pled guilty to aggravated robbery in March 2009 and received a ten-year sentence with the ability to file for judicial release after serving five and one-half years without opposition from the State. As part of her plea agreement, Nichols made a proffer statement and agreed to testify truthfully against Danko and any co-defendants (such as appellant) in future proceedings. Although Nichols did not identify appellant when shown a photo array, she did make an in-court identification at appellant's trial.

{¶ 14} Danko pled guilty in April 2010 to the stipulated lesser included offense of involuntary manslaughter and received a ten-year sentence, which was imposed concurrently with the sentence Danko was serving on an unrelated matter in Kentucky. As part of his plea agreement, he also made a proffer statement and agreed to testify truthfully against any co-defendants. Danko identified appellant from a photo array and made an in-court identification at the trial.

{¶ 15} On April 22, 2011, the jury returned its verdicts, finding appellant guilty of all four counts with specifications. On August 5, 2011, a sentencing hearing was held. The trial court imposed a total aggregate sentence of 18 years to life. The trial court filed a judgment entry of conviction journalizing the conviction and sentence on August 9, 2011.

This timely appeal now follows in which appellant asserts three assignments of error for our review.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1

> THE OHIO REVISED CODE IS UNCONSTITUTIONAL AS APPLIED TO THIS DEFENDANT, WHO WAS CHARGED AS AN ACCOMPLICE TO FELONY MURDER; THE APPLICATION OF THE COMPLICITY STATUTE AND THE MURDER STATUTE TOGETHER PROVIDE THAT THE STATE CAN MEET ITS BURDEN BY PROVING ONLY AN INFERENCE UPON AN INFERENCE, WHICH IS A LEGALLY IMPERMISS[I]BLE STANDARD OF PROOF[.]

ASSIGNMENT OF ERROR NO. 2

> THE DEFENDANT/APPELLANT WAS DENIED HIS CONS[T]ITUTIONAL RIGHT UNDER THE CONFRONTATIONS CLAUSES OF THE UNITED STATES AND OHIO CONSTITUTIONS, OHIO REVISED CODE §2945.12 AND CRIMINAL RULE 43(A), ALL OF WHICH AFFORD HIM THE RIGHT TO BE PRESENT FOR ALL JURY PROCEEDINGS[.]

ASSIGNMENT OF ERROR NO. 3

> THE STATE'S ATTORNEY COMMITTED PROSECUTORIAL MISCONDUCT BY (1) IMPROPERLY VOUCHING FOR THE CREDIBILITY OF THE STATE'S WITNESSES AND (2) BY ARGUING MATTERS OF PERSONAL BELIEF AND MATTERS NOT IN EVIDENCE IN HIS CLOSING ARGUMENTS[.]

A. First Assignment of Error—The Constitutionality of the Felony-Murder Statute, Inference Stacking, and the Sufficiency of the Evidence

{¶ 16} In his first assignment of error, appellant argues the felony-murder statute as applied here under a theory of complicity is unconstitutional because it permits the State to ignore its standard of proof and to prove its case by stacking one inference on top of another when appellant was not operating as a principal offender.

{¶ 17} Pursuant to R.C. 2903.02(B), felony murder is committed where one "cause[s] 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 and that is not a violation of section 2903.03 [voluntary manslaughter] or 2903.04 [involuntary manslaughter]of the Revised Code." Under the felony-murder provision, purpose to kill is not an element of the crime and need not be proven. Instead, the mens rea for felony murder is the intent that is required to commit the underlying predicate offense. *See State v. Walters*, 10th Dist. No. 06AP-693, 2007-Ohio-5554, ¶ 61 (the prosecution is not required to prove a culpable mental state with respect to murder under the felony-murder doctrine because the intent to kill is presumed if the state proves intent to commit the underlying, predicate felony).

{¶ 18} Laws are entitled to a strong presumption of constitutionality and a party challenging the constitutionality of a law has the burden of proving the law is unconstitutional beyond a reasonable doubt. *Yajnik v. Akron Dept. of Health, Hous. Div.*, 101 Ohio St.3d 106, 2004-Ohio-357, ¶ 16, citing *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142 (1995), paragraph one of the syllabus; *Ohio Grocers Assn. v. Levin*, 123 Ohio St.3d 303, 2009-Ohio-4872, ¶ 11. Here, appellant must also establish plain error, as he did not challenge the constitutionality of the felony-murder statute at the trial level. Under Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." We notice plain error "'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.' " *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68, quoting *State v. Long*, 53 Ohio St.2d 91 (1978), paragraph three of the syllabus.

{¶ 19} In the instant case, the theory of appellant's participation in the crime is one of complicity, whereby he aided or abetted the principal, i.e., Greenberg, in the commission of the felony offenses of aggravated robbery, aggravated burglary, and/or felonious assault. In the process of committing those offenses, the principal committed a murder. Appellant argues that because he was an aider and abettor, rather than the principal offender, the only way the jury could find him guilty was by inference stacking, which is prohibited.

{¶ 20} The complicity statute, R.C. 2923.03, states, in relevant part, as follows:

> (A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:

> * * *
>
> (2) Aid or abet another in committing the offense;
>
> * * *
>
> (F) Whoever violates this section is guilty of complicity in the commission of an offense, and shall be prosecuted and punished as if he were a principal offender. A charge of complicity may be stated in terms of this section, or in terms of the principal offense.

{¶ 21} Here, appellant argues the jury had to make the following two inferences in order to convict him of felony murder: (1) that the principal offender intended to commit the crime of aggravated burglary, aggravated robbery, or felonious assault, and that appellant was an accomplice to the offense(s), and (2) that appellant's participation in the commission of the predicate felony was the proximate cause of Daniels' death, despite the lack of a specific intent to kill.

{¶ 22} Appellant claims the legislature, in rewriting R.C. 2903.02 in the late 1990's, created an unconstitutional statute because it, along with the complicity theory, permits an accomplice to be charged as a principal to murder where the principal's mental state can be proven without evidence of the principal's purpose to kill and without evidence of the principal's intent to engage in conduct likely to cause death. Because the accomplice's guilt is determined based upon the principal and in the absence of purpose or voluntariness on the part of the accomplice, appellant argues the statute is unconstitutional as applied.

{¶ 23} In Ohio, statutes define crimes, not common law. *Akron v. Rowland*, 67 Ohio St.3d 374, 383 (1993), fn. 4. Admittedly, R.C. 2903.02(B) does not require purpose to kill, as it does not require the state to prove purpose or specific intent to cause death. *State v. Ford*, 10th Dist. No. 07AP-803, 2008-Ohio-4373, ¶ 27. Thus, 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. *Walters* at ¶ 61. However, this does not mean the statutory provision for felony murder is unconstitutional. "[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.

{¶ 24} We have held on numerous occasions that the lack of a purpose to kill element does not make the felony-murder statute unconstitutional or defective. *See State v. Arthurs*, 10th Dist. No. 09AP-409, 2010-Ohio-624, ¶ 31 (a killing does not have to be purposeful to be a murder under the Ohio and United States Constitutions; neither the Supreme Court of Ohio nor the Supreme Court of the United States has found the felony-murder rule to be unconstitutional); *Walters* at ¶ 61 (R.C. 2903.02(B) does not require the prosecution to prove purpose or specific intent to cause death; the mens rea element for felony murder is satisfied when the state proves the intent required for the underlying felony offense); *Ford* at ¶ 27 (the felony-murder statute does not require the state to prove purpose or a specific intent to cause death).

{¶ 25} In the instant case, appellant challenges his conviction, arguing that in order to convict him of murder, it must be inferred that he had the requisite intent to be an aider or abetter, *and* that the principal had the requisite intent to commit the predicate felony offense, *and* that Daniels' death was proximately caused by the predicate offense. This is where appellant claims the improper inference stacking comes into play. We disagree.

{¶ 26} First, we agree with the State's position that whether a conviction is based upon inference stacking goes to the sufficiency of the evidence, not the constitutionality of the statute under which the defendant has been charged. *See State v. Pilgrim*, 184 Ohio App.3d 675, 2009-Ohio-5357 (10th Dist.), ¶ 25. Moreover, we do not find impermissible inference stacking here.

{¶ 27} The rule prohibiting the stacking of one inference upon another prohibits "the drawing of one inference solely and entirely from another inference, where that inference is unsupported by any additional facts or inferences drawn from other facts." *Donaldson v. N. Trading Co.*, 82 Ohio App.3d 476, 481 (10th Dist.1992), citing *Hurt v. Charles J. Rogers Transp. Co.*, 164 Ohio St. 329 (1955), paragraph one of the syllabus. However, it does not prohibit using parallel inferences with additional facts. *Id.* at paragraph two of the syllabus. In addition, it does not prohibit the drawing of multiple, separate inferences from the same set of facts. *McDougall v. Glenn Cartage Co.*, 169 Ohio

St. 522 (1959), paragraph two of the syllabus. The rule against stacking inferences is limited to inferences drawn exclusively from other inferences. *Donaldson* at 481.

{¶ 28} Next, we look at intent as it relates to the underlying offense. Intent cannot be proven by the direct testimony of a third person; rather, it can be inferred from the surrounding facts and circumstances of the crime. *State v. Galloway*, 10th Dist. No. 03AP-407, 2004-Ohio-557, ¶ 22-23. *See also State v. Johnson*, 93 Ohio St.3d 240 (2001), syllabus. An offender's purpose and intent can be proven solely through circumstantial evidence. *Galloway* at ¶ 23. Here, there is evidence showing the intent of both the principal (Greenberg) and the accomplice (appellant).

{¶ 29} According to his own testimony, Greenberg was part of the plan to go inside the duplex in order to steal money and drugs. He entered the residence armed with a handgun. According to the testimony of others, appellant was also one of the "inside" guys and was part of the plan. He approached the residence with a club or a stick. Although he did not get inside the residence, he played a key role in facilitating Greenberg's flight from the residence and the scene following Greenberg's actions, which included forced entry, the shooting and killing of one of the occupants, and the wounding of another, and the theft of money and drugs. As previously stated, multiple inferences can be drawn separately from the same set of facts, *McDougall* at paragraph two of the syllabus, and intent may be inferred based upon the circumstances surrounding the crime. *Johnson* at the syllabus.

{¶ 30} In addition, we do not find the "causing the death of another as a proximate result" element to be based upon impermissible inference stacking. " '[I]t is irrelevant whether the killer was the defendant, an accomplice, or some third party. * * * A defendant can be held criminally responsible for the killing regardless of the identity of the person killed or the identity of the person whose act directly caused the death, so long as the death is the "proximate result" of [the] defendant's conduct in committing the underlying felony offense; that is, a direct, natural, reasonably foreseeable consequence, as opposed to an extraordinary or surprising consequence, when viewed in the light of ordinary experience.' " *Ford* at ¶ 31, quoting *State v. Dixon*, 2d Dist. No. 18582 (2002).

{¶ 31} In committing an aggravated burglary and/or aggravated robbery armed with a weapon, and when the occupants of the residence are known to be present, it is a

direct, natural, and reasonably foreseeable consequence that such actions would result in the death of another. *See generally State v. Jennings*, 10th Dist. No. 09AP-70, 2009-Ohio-6840, ¶ 51 (the felony murder statute contemplates a proximate cause theory, whereby the death was a reasonably foreseeable consequence of the two defendants' aggravated robbery offense, regardless of which of the two pulled the trigger). *See also State v. Weber*, 2d Dist. No. 22167, 2008-Ohio-4025, ¶ 22 (the defendant's involvement with an accomplice in an armed robbery caused a chain of events in which one of the reasonably foreseeable consequences was the death of the accomplice; the defendant's involvement in the robbery was a proximate cause of the death of another).

{¶ 32} To prove complicity by aiding and abetting pursuant to R.C. 2923.03(A)(2), the prosecution must show "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." *Johnson* at the syllabus; *see also State v. Jackson*, 10th Dist. No. 03AP-273, 2003-Ohio-5946, ¶ 32; *State v. Chatman*, 10th Dist. No. 08AP-803, 2009-Ohio-2504, ¶ 26. Aiding and abetting may also be established through overt acts of assistance. *State v. Trocodaro*, 36 Ohio App.2d 1, 6 (10th Dist.1973). However, " 'the mere presence of an accused at the scene of a crime is not sufficient to prove, in and of itself, that the accused was an aider and abettor.' " *State v. McWhorter*, 10th Dist. No. 08AP-263, 2008-Ohio-6225, ¶ 18, quoting *State v. Widner*, 69 Ohio St.2d 267, 269 (1982). Aiding and abetting requires the accused to have taken some role in causing the offense. *McWhorter* at ¶18, citing *State v. Sims*, 10 Ohio App.3d 56, 59 (8th Dist.1983).

{¶ 33} Contrary to appellant's claims, the evidence is sufficient to demonstrate more than appellant's mere presence at the scene. In fact, the evidence is sufficient to demonstrate appellant aided and abetted in the underlying offense by: (1) participating in the planning of the robbery; (2) approaching the duplex with Greenberg and James; (3) carrying a club or a stick; and (4) assisting Greenberg in fleeing from the scene.

{¶ 34} In conclusion, we find appellant has failed to show that R.C. 2903.02(B) is unconstitutional or that impermissible inference stacking occurred, or that the evidence was insufficient to find appellant guilty under the felony-murder statute. We further find no plain error. Accordingly, we overrule appellant's first assignment of error.

B. Second Assignment of Error—Appellant's Presence at the Jury Proceedings

{¶ 35} In his second assignment of error, appellant claims he was denied due process and his rights under the confrontation clauses of the United States and Ohio Constitutions because he was not present for all aspects of the jury proceedings. We disagree.

{¶ 36} According to conclusions drawn from the record, appellant was absent from the proceedings for the afternoon of April 21, 2011, due to the fact that his wife was giving birth to their child on that day, and therefore he missed the final day of trial. Prior to the start of the proceedings that afternoon, the trial court instructed the jury, at the request of appellant's counsel, that appellant was "excused for the afternoon for some personal matters." (Tr. 596.) No written waiver of appellant's appearance is present in the record.

{¶ 37} During the proceedings that afternoon, counsel for appellant conducted further cross-examination of one of the State's witnesses, which in turn, resulted in additional re-direct from the State. This testimony spans approximately five pages in a trial that produced over 700 pages of transcript. During that afternoon, the parties also admitted their exhibits, introduced two agreed stipulations, and gave closing arguments. The trial court instructed the jury and the jury began its deliberations. Late in the afternoon, the jury sent out a written question, which the trial court answered in writing. There is no indication in the record as to whether the trial court consulted with counsel in providing the court's written response.

{¶ 38} The following day, April 22, 2011, appellant was again present for the proceedings. On that day, the jury produced two additional written questions, which the trial court answered in writing, but the record does not reveal whether or not counsel provided input. Later that day, the jury returned its verdicts.

{¶ 39} Pursuant to Crim.R. 43(A):

> [T]he defendant must be physically present at every stage of the criminal proceeding and trial, including the impaneling of the jury, the return of the verdict, and the imposition of sentence, except as otherwise provided by these rules. In all prosecutions, *the defendant's voluntary absence after the trial has been commenced in the defendant's presence shall not prevent continuing the trial to and including the verdict.*

(Emphasis added.)

{¶ 40} Accordingly, the issues to be determined here are: (1) whether or not appellant's absence from the trial during the afternoon of April 21, 2011 was voluntary; (2) whether or not his counsel waived his appearance and any challenge to continuing with the trial in appellant's absence when he failed to object; and (3) whether or not plain error exists.

{¶ 41} The constitutional guarantees which mandate the presence of the accused, absent a waiver of his rights, at every stage of his trial are embodied in Crim.R. 43(A). *State v. Homesales, Inc.*, 190 Ohio App.3d 385, 2010-Ohio-5572, ¶ 8 (1st Dist.), citing *State v. Meade*, 80 Ohio St.3d 419, 421 (1997). "[T]he right to be present at trial may be waived by the defendant's own act." *Meade* at 421.

{¶ 42} In the instant case, there is nothing in the record to rebut the presumption that appellant knew of his obligation to attend the proceedings. *See State v. Carr*, 104 Ohio App.3d 699, 703 (2d Dist.1995) (pursuant to Crim.R. 43(A), it is presumed that a defendant who is present at trial knows of his obligation to appear in court throughout the trial proceedings). In fact, on April 20, 2011, the trial court stated on the record that everyone was to return the following day (April 21, 2011) at 1:00 p.m. Although appellant may have desired to attend the birth of his child and may have felt an emotional or parental obligation to do so, appellant had a duty to appear at trial. *See State v. Kirkland*, 18 Ohio App.3d 1, 2 (8th Dist.1984) (the principles set forth in Crim.R. 43(A), which guarantee an accused the right to be present at every stage of his trial unless he voluntarily absents himself subsequent to the impaneling and swearing of the jury, also impose a duty upon the accused to appear at trial). Appellant's decision to attend the birth of his child instead of appearing for his murder trial was a voluntary absence, as it was the "product of [his] own free choice and unrestrained will." *Carr* at 703; *State v. Calhoun*, 11th Dist. No. 2010-A-0057, 2012-Ohio-1128, ¶ 31. *See also State v. Spinks*, 79 Ohio App.3d 720, 733 (8th Dist.1992) (defendant's absence was deemed voluntary where the record reflected she had attended her son's graduation ceremony, with the court's permission, rather than the trial proceedings; defendant was not denied her right to be present).

{¶ 43} Furthermore, even if appellant's absence was not voluntary, trial counsel for appellant failed to object to the trial court's decision to continue with the trial in appellant's absence. In looking at the record, the only request from trial counsel on this issue was as follows:

> MR. PUSATERI: Judge, insofar as Mr. Maynard's absence is concerned and the instruction the jury will be given, our only request, and I'm sure it's on the Court's mind, too, is we want to make clear that it's an excused absence and he's not absconded. Any other way you want to phrase it, it doesn't matter, whatever. It doesn't - - as far as - -[.]
>
> THE COURT: Okay. I'll just say he's been excused for the afternoon because of some personal matters.
>
> MR. PUSATERI: That's fine.

(Tr. 595-96.)

{¶ 44} Any error in the trial court's decision to continue with the trial in appellant's absence was waived because appellant's trial counsel did not object. Thus, we must review this issue under a plain error standard. As previously stated above, we notice plain error " 'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.' " *Barnes* at 27, quoting *Long* at paragraph three of the syllabus. Plain error does not exist unless it can be stated that, but for the error, the outcome of the trial would have clearly been otherwise, but for the error. *State v. Reed*, 10th Dist. No. 09AP-1164, 2010-Ohio-5819, ¶ 13, citing *Long* at 97.

{¶ 45} We cannot find that the outcome of the trial would have clearly been otherwise had appellant not been absent during the trial proceedings that occurred on the afternoon of April 21, 2011. Appellant has produced nothing to demonstrate that the outcome would have been different if he had been present for the few minutes of testimony that occurred in his absence, or for the stipulations or admission of the exhibits, or for the closing arguments, or for the submission of the trial court's written answer to the jury's question about simply obtaining a copy of a transcript of the proceedings.

{¶ 46} Therefore, because we find appellant's absence from the trial proceedings was voluntary, and because we find no plain error in the trial court's decision to proceed in his absence, we overrule appellant's second assignment of error.

C. Third Assignment of Error—Allegations of Prosecutorial Misconduct

{¶ 47} In his third assignment of error, appellant contends the prosecutor committed prosecutorial misconduct by: (1) expressing a personal opinion as to the credibility of the witnesses and arguing his own personal beliefs, and (2) arguing matters not in evidence during closing argument.

{¶ 48} In reviewing allegations of prosecutorial misconduct, the test is whether the conduct is improper and whether the conduct prejudicially affected the substantial rights of the accused. *Pilgrim* at ¶ 57; *State v. Guade*, 10th Dist. No. 11AP-718, 2012-Ohio-1423, ¶ 20, citing *State v. White*, 82 Ohio St.3d 16, 22 (1998). " '[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.' " *State v. Wilkerson*, 10th Dist. No. 01AP-1127, 2002-Ohio-5416, ¶ 38, quoting *Smith v. Phillips*, 455 U.S. 209, 219 (1982). Therefore, prosecutorial misconduct will not be grounds for reversal unless the accused has been denied a fair trial. *State v. Maurer*, 15 Ohio St.3d 239, 266 (1984). Prosecutors are afforded wide latitude in closing arguments, which must be reviewed in their entirety in order to determine the impact of the allegedly improper remarks. *State v. Treesh*, 90 Ohio St.3d 460, 466 (2001); *State v. Hill*, 75 Ohio St.3d 195, 204 (1996). If the accused or his counsel failed to object to the comment, he has forfeited all but plain error. *State v. Williams*, 79 Ohio St.3d 1, 12 (1997). Reversal for prosecutorial misconduct is warranted under the plain error standard if it is clear that the accused would not have been convicted without the improper conduct. *State v. Saleh*, 10th Dist. No. 07AP-431, 2009-Ohio-1542, ¶ 68.

{¶ 49} Appellant argues it is the cumulative effect of the prosecutor's line of questioning, rather than particular individual comments, which constitute the purported misconduct. Appellant submits the prosecutor repeatedly asked numerous witnesses whether they were being truthful and made personal assessments as to the witnesses' credibility. Appellant argues this line of questioning, coupled with the State's improper closing argument, meant the jurors did not have the opportunity to assess the credibility

of the witnesses for themselves because the State repeatedly told the jurors that the witnesses were credible.

{¶ 50} Specifically, appellant argues the prosecutor improperly vouched for the credibility of the co-defendant witnesses—Greenberg, Nichols, and Danko—by asking them during direct examination whether they were telling the truth. Improper vouching occurs where an attorney expresses his personal belief or opinion as to the credibility of a witness or as to the guilt of the accused. *Williams* at 12; *State v. Smith*, 14 Ohio St.3d 13, 14 (1984). Here, like in *Williams*, the evidence does not establish that the prosecutor was "vouching" for the witnesses, but rather that he was exploring the basis of the plea agreements, which included a requirement that the co-defendants Greenberg, Nichols, and Danko testify truthfully against any other co-defendants. The prosecution is not prohibited from establishing that a co-defendant/witness entered into a plea agreement which includes an agreement to tell the truth. *State v. Jackson*, 92 Ohio St.3d 436, 449 (2001). Contrary to appellant's assertions, the record here does not demonstrate that the prosecutor expressed a personal belief about the reliability of the witnesses' testimony. *See State v. D'Ambrosio*, 67 Ohio St.3d 185, 192 (1993) (court declined to interpret the prosecutor's question of: "Is what you told the Court here the truth?" as implied vouching).

{¶ 51} Furthermore, of those questions pointed out by appellant which were directed at truthfulness, only the objections to two of them were overruled. All other objections by counsel were sustained. Therefore, we cannot say that these questions, even if we presumed them to be improper for the sake of argument, affected the fairness of the trial or caused prejudice to appellant.

{¶ 52} With respect to the prosecution's closing arguments, we do not find that the prosecution argued his own personal beliefs as to the credibility of the witnesses' testimony. The prosecutor did not express a personal opinion about the credibility of Greenberg, Nichols, or Danko; rather, the prosecutor acted properly in arguing that the evidence and the testimony of all of the witnesses, taken together, supported the conclusion that the witnesses were believable as to the testimony they provided at trial. *See State v. Thompson*, 10th Dist. No. 10AP-593, 2011-Ohio-6725, ¶ 38 (counsel are entitled to a wide degree of latitude during closing arguments; the prosecution may

submit reasonable inferences based upon the evidence presented at trial and also comment on those inferences).

{¶ 53} Finally, appellant argues the prosecution committed misconduct by arguing facts not in evidence during its rebuttal closing. In response to appellant's argument that the State's case was flawed because it had failed to introduce the testimony of any police detectives, the prosecutor commented that the detectives had been available and were just outside the courtroom if their testimony became necessary, but the State had not found their testimony to be either relevant or necessary. Counsel for appellant objected to the State's comments as personal comments on facts which were not in evidence. Because appellant's objection to those comments was sustained, we find appellant's argument to be without merit, as there was no prejudice to appellant. *See State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, ¶ 94 (in reviewing the prosecutor's argument in its entirety, and even in construing a particular remark as misconduct, it lacked a prejudicial effect and did not warrant reversal because the court sustained the objection).

{¶ 54} Accordingly, we overrule appellant's third assignment of error.

III. Conclusion

{¶ 55} Based upon the foregoing, we overrule appellant's first, second, and third assignments of error. The judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

SADLER and TYACK, JJ., concur.

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