**[Cite as *State v. Canada*, 2015-Ohio-2167.]**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

| | | |
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| State of Ohio, | : | |
| Plaintiff-Appellee, | : | |
| | | No. 14AP-523 |
| v. | : | (C.P.C. No. 13CR-6315) |
| Marcus A. Canada, | : | (REGULAR CALENDAR) |
| Defendant-Appellant. | : | |

D E C I S I O N

Rendered on June 4, 2015

*Ron O'Brien*, Prosecuting Attorney, and *Valerie B. Swanson*, for appellee.

*Jeremy A. Roth*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

SADLER, J.

**{¶ 1}** Defendant-appellant, Marcus A. Canada, appeals from a judgment of conviction and sentence entered by the Franklin County Court of Common Pleas pursuant to a jury verdict finding him guilty of aggravated burglary and domestic violence. For the following reasons, we affirm.

## I. FACTS AND PROCEDURAL HISTORY

**{¶ 2}** On November 27, 2013, appellant was indicted on two counts of aggravated burglary, in violation of R.C. 2911.11(A)(1), first-degree felonies (Counts 1 and 2), and one count of domestic violence, in violation of R.C. 2919.25(A) and (D)(4), a third-degree felony (Count 3). The charges arose from an incident occurring on November 9, 2013.

**{¶ 3}** At appellant's request, the matter was tried before a jury. Plaintiff-appellee, State of Ohio, presented the following evidence during its case-in-chief.

**{¶ 4}** Shelton Traylor, the father of Alicia and Anthony Jenkins, testified that Alicia had been in an "on again/off again relationship" with appellant for the last seven years, including a period in 2011 when the couple lived together. (Tr. 48.) At some point, Alicia moved to an apartment located at 1842 Noe-Bixby Road, where she resided on November 9, 2013.

**{¶ 5}** During Shelton's testimony, the prosecutor, over appellant's objection, played a recording of three calls made on November 9, 2013. Shelton identified the first and third callers as his daughter, Alicia, and the second caller as his son, Anthony.

**{¶ 6}** In the first call, made to a non-emergency police number at 5:33 a.m., Alicia requested that an officer be sent to her residence because she had "an intruder." (Tr. 52, State's exhibit No. 19.) She specifically averred that her "ex-boyfriend decided to come kick my door in and he's standing in my living room refusing to leave." (Tr. 52, State's exhibit No. 19.) Alicia provided her full name, an address of 1842 Noe-Bixby Road, and her telephone number. She identified the "intruder" as appellant and provided a general description of him.

**{¶ 7}** In the second call, made to 911 at 7:16 a.m., Anthony reported "there's an intruder." (Tr. 53, State's exhibit No. 19.) Anthony then asked "Sis, what's the address?" (Tr. 54, State's exhibit No. 19.) A female voice responded "1842," and Anthony relayed that information to the 911 dispatcher. (Tr. 54, State's exhibit No. 19.) The female voice then stated "[h]e's back," and Anthony repeated that phrase to the 911 dispatcher. (Tr. 54, State's exhibit No. 19.)

**{¶ 8}** In the third call, made to 911 at 7:21 a.m., Alicia averred, "I need a cruiser here now." (Tr. 55, State's exhibit No. 19.) She reported her address as 1842 Noe-Bixby Road and averred she "[had] been calling the police." (Tr. 55, State's exhibit No. 19.) When the 911 dispatcher asked what was happening, Alicia stated, "[m]y crazy * * * ex-boyfriend kicked in my door at 5:30 in the morning. He's back. He kicked in my back door. He smacked me. He put his hands on my brother." (Tr. 56, State's exhibit No. 19.) Upon questioning by the 911 dispatcher, Alicia provided appellant's name and averred he was "here now." (Tr. 56, State's exhibit No. 19.) The dispatcher told Alicia the police were

on their way and then asked what appellant was wearing. Alicia described appellant's clothing in great detail. When asked if appellant had arrived on foot or in a car, Alicia responded, "[h]e's parked around the corner. I don't know what he's driving." (Tr. 57, State's exhibit No. 19.) The dispatcher then averred, "[y]ou don't know what he's driving. 'Cause, you know, as soon as we pull up, that's where he's going to go running for his car." (Tr. 57, State's exhibit No. 19.) Alicia responded, "[i]t's a gray Mountaineer. I seen him pull up in it this morning. That's what he has to be driving." (Tr. 57, State's exhibit No. 19.) The dispatcher told Alicia to go out outside and talk to the police. Alicia responded, "[w]e're outside now, he's still here." (Tr. 57, State's exhibit No. 19.) The dispatcher then warned Alicia to stay away from appellant.

**{¶ 9}** After the recording of the calls was played, the prosecutor questioned Shelton about the events of November 9, 2013. To that end, Shelton testified that he received a phone call from Alicia at about 5:30 a.m. requesting that he repair her broken front door. Alicia did not tell Shelton what had happened to the door. According to Shelton, Alicia seemed "a little agitated," but was not upset or crying or screaming. (Tr. 60.) Shelton told her he would fix the door after he retrieved Anthony from work later that morning.

**{¶ 10}** Shelton and Anthony arrived at Alicia's sometime around 7:00 a.m. Shelton repaired the door and then left. Anthony remained at Alicia's apartment. Shelton returned later that morning to find Alicia and Anthony standing in the parking lot of the apartment complex. Shelton observed appellant exit Alicia's apartment through the back door and then leave the area. Shelton identified several photographs depicting damage to the front and back doors of Alicia's apartment as well as injuries sustained by Alicia and Anthony.

**{¶ 11}** On cross-examination, Shelton averred that Alicia sounded "a little anxious" but not "upset" in the call to the non-emergency police number and that he was not concerned about her safety when she called him at 5:30 a.m. (Tr. 78.) He acknowledged he did not observe appellant kick in either of Alicia's doors or strike either Alicia or Anthony. Shelton further testified that appellant paid some of the bills at the Noe-Bixby apartment and that sometime after November 9, 2013, he took some of appellant's personal belongings from Alicia's apartment to appellant's mother's house.

**{¶ 12}** Columbus Police Officer Doug Garrett testified that he was dispatched to 1842 Noe-Bixby Road sometime after 7:00 a.m. on November 9, 2013. Upon entering the apartment, Officer Garrett noticed "signs of [a] struggle," including damaged doorframes and blood on the wall coming down the stairway. (Tr. 91.) He also observed bruises on Alicia's arm and a mark on her face "as if she had been slapped around." (Tr. 88.) In addition, Anthony's fist was scratched and bloody. Officer Garrett took statements from Alicia and Anthony. According to Officer Garrett, no information gathered during the course of his investigation established that appellant lived at 1842 Noe-Bixby Road.

**{¶ 13}** Columbus Police Officer Donald J. Dawson, Jr., testified that he arrested appellant on an outstanding felony warrant issued following the November 9, 2013 incident. Upon his arrest, appellant provided an address of 45 Stevens Avenue; appellant did not aver that he lived at 1842 Noe-Bixby Road.

**{¶ 14}** During Officer Dawson's testimony, the prosecutor played a recording of a call made from the Franklin County Corrections Center following appellant's arrest. Officer Dawson identified the caller as appellant. During the call, appellant identified himself as "M.C." (Tr. 102, State's exhibit No. 27.) He averred he was in the "workhouse" on a "felony thing" and that he had kicked in Alicia's front door, left the area to get food, then returned to Alicia's, kicked in the back door, and slapped her. (State's exhibit No. 27.)[1]

**{¶ 15}** Columbus Police Detective William Rotthoff testified that he investigated the incident on November 9, 2013. He interviewed Alicia and described her demeanor as "physically upset [and] shook up." (Tr. 109.) According to Detective Rotthoff, Alicia was upset because the police did not respond at all to her first call and were slow to respond to her second call. Detective Rotthoff observed that both the front and back doors had sustained significant damage due to being kicked in. Detective Rotthoff identified several photographs depicting the damage to the doors and injuries sustained by Alicia and Anthony. He testified that his investigation revealed no evidence indicating that appellant

[1] The court reporter transcribed only the procedural portion of the call, which included appellant's identification of himself as "M.C." (Tr. 102, State's exhibit No. 27.) The court reporter did not transcribe the substantive portion of the call, stating "because of the poor quality of the CD and the speakers interrupting each other, a transcript could not be made. Please refer to CD – State's Exhibit 27 for content." (Tr. 102.)

resided at the Noe-Bixby residence and that the documentation incident to appellant's arrest listed appellant's address as 45 Stevens Avenue.

**{¶ 16}** The parties stipulated to the admission of State's exhibits Nos. 23 and 24, certified copies of judgment entries issued by the Franklin County Municipal Court on February 25, 2010 and May 4, 2011, respectively, convicting appellant of domestic violence.

**{¶ 17}** Appellant testified on his own behalf. According to appellant, on November 9, 2013, he lived with Alicia "as boyfriend and girlfriend" at 1842 Noe-Bixby Road, had personal belongings there, and paid expenses, including rent. (Tr. 135.) At approximately 5:30 a.m., he drove home after spending the evening at a bar and a gentleman's club. When he arrived, he noticed Alicia's car was not in the parking lot. He did not have his key to the apartment because he had given it to a cousin who was working on his car. Appellant called Alicia several times because he wanted to get inside and go to sleep. When she did not respond, he kicked in the front door to gain entry. Alicia came down the stairs and argued with appellant about kicking in the door. According to appellant, he neither physically assaulted nor threatened to physically assault Alicia. He then left the apartment to get something to eat.

**{¶ 18}** Appellant returned approximately 45 minutes later. Because Alicia had blocked entry through the front door, appellant knocked on the back door. Alicia's brother, Anthony, told him to "wait a minute." (Tr. 139.) After several minutes passed, appellant kicked in the back door. He yelled at Anthony for not opening the door, but neither assaulted him nor threatened physical violence. Anthony walked upstairs and returned a few moments later with Alicia. Alicia argued with appellant about kicking in the doors. She and Anthony then walked outside to assess the damage to the back door. Appellant left the apartment because he did not want to continue arguing with Alicia. Appellant denied assaulting or threatening to assault either Alicia or Anthony.

**{¶ 19}** When questioned about the statements he made in the jailhouse call, appellant testified he was "lying" at the time because he "was trying to avoid any more problems or anything like ridicule from friends or my family members toward her and her family, or basically her brother and her. Basically, * * * I didn't want anybody looking at her 'cause she got me locked up for kicking my own door in." (Tr. 145-46.)

**{¶ 20}** On cross-examination, appellant testified that the statement he made in the jailhouse call about kicking in the doors was the truth, but that his statement about slapping Alicia was "a lie." (Tr. 149.) He explained that he lied about slapping Alicia because he "didn't want the word to get out that she made this charge up." (Tr. 149.)

**{¶ 21}** Thereafter, upon questioning by the prosecutor, appellant admitted he had been incarcerated as a result of felony convictions for aggravated assault, cocaine possession and carrying a concealed weapon in 2002, and aggravated assault in 2011. Although appellant conceded he did not want to return to prison, he denied he would "say anything" to keep from doing so. (Tr. 154.) Appellant averred his trial testimony was truthful and the jailhouse call included "a half truth." (Tr. 155.) He admitted he kicked in both doors at the Noe-Bixby apartment but denied assaulting Alicia or Anthony.

**{¶ 22}** The jury found appellant guilty of Counts 2 and 3 and not guilty of Count 1. Thereafter, the trial court issued a judgment entry consistent with the jury's verdicts and imposed a prison term of three years for the aggravated burglary and two years for the domestic violence, to be served consecutively, for an aggregate prison term of five years.

## II. ASSIGNMENTS OF ERROR

**{¶ 23}** In a timely appeal, appellant asserts the following seven assignments of error:

> 1. The trial court erred by admitting inadmissible out-of-court declarations in violation of the Ohio Rules of Evidence and the Confrontation Clauses of the Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution.
>
> 2. The trial court erred in preventing defense counsel from effectively cross examining Officer Dawson on matters contained in the State's direct examination in violation of Appellant's rights to a fair trial under the United States and Ohio Constitutions.
>
> 3. Appellant was substantially prejudiced and denied a fair trial when the lower court allowed other bad acts into evidence that was not admissible under Evid.R. 403(A).
>
> 4. Appellant's right to a fair trial under the United States and Ohio Constitutions was violated when the state engaged in prosecutorial misconduct when the prosecuting attorney

> denigrated defense counsel and made improper comments during closing arguments.
>
> 5. Appellant was deprived of a fair [ ] trial under the United States and Ohio Constitutions due to ineffective assistance of counsel by counsel's failure to object to prosecutorial misconduct during closing arguments.
>
> 6. Appellant was denied a right to a fair trial under the United States and Ohio Constitutions by the trial court's cumulative error in admitting testimony regarding other bad acts and hearsay as well as permitting prosecutorial misconduct.
>
> 7. The trial court erred when it entered judgment against the Appellant when the evidence was insufficient to sustain the convictions and the convictions are against the manifest weight of the evidence.

## III. DISCUSSION

### A. First Assignment of Error

**{¶ 24}** In his first assignment of error, appellant contends the trial court erred in admitting statements made by Alicia and Anthony in the three recorded telephone calls made on November 9, 2013. Despite capiases issued against them, neither Alicia nor Anthony appeared at trial. Appellant argues admission of their out-of-court statements violated the Ohio Rules of Evidence as well as his right to confront the witnesses against him as guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution.

**{¶ 25}** Prior to the commencement of testimony, defense counsel made an oral motion in limine asking the court to exclude the statements made in the recorded calls on grounds they were testimonial evidence which should be excluded from trial pursuant to his constitutional right to confront witnesses against him. The prosecutor urged admission of the statements under the excited utterance exception to the hearsay rule. After taking a short recess to listen to the calls, the trial court denied appellant's motion. Following presentation of its case, the prosecutor moved to admit State's exhibit No. 19, the CD containing all three calls. Defense counsel objected on grounds that admission of the statements violated Ohio evidentiary rules and state and federal constitutional provisions. The trial court overruled the objection and admitted the CD.

**{¶ 26}** We first address appellant's contentions that the trial court erred in admitting the recorded statements under Ohio evidentiary rules pursuant to the hearsay exception for excited utterances.

**{¶ 27}** "Hearsay" is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). "Pursuant to Evid.R. 802, hearsay is inadmissible unless it falls within an exception provided by the rules of evidence." *State v. L.E.F.*, 10th Dist. No. 13AP-1042, 2014-Ohio-4585, ¶ 5. "As with other evidentiary rulings, the determination whether hearsay statements are subject to exception rests within the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion." *State v. Worth*, 10th Dist. No. 10AP-1125, 2012-Ohio-666, ¶ 20, citing *State v. Hand*, 107 Ohio St.3d 378, 2006-Ohio-18, ¶ 92. An abuse of discretion is more than a mere error of law or judgment; it connotes an unreasonable, arbitrary or unconscionable attitude by the trial court. *Id.*, citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

**{¶ 28}** Evid.R. 803(2) provides an exception to the hearsay rule if the out-of-court statement constituted an "excited utterance," defined as a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." "This exception applies regardless of the declarant's availability as a witness." *State v. McClain*, 10th Dist. No. 13AP-347, 2014-Ohio-93, ¶ 26, citing Evid.R. 803.

**{¶ 29}** In *State v. Taylor*, 66 Ohio St.3d 295, 300-01 (1993), the Supreme Court of Ohio outlined the four-part test for admissibility of hearsay as an excited utterance, as set forth in *Potter v. Baker*, 162 Ohio St. 488 (1955), paragraph two of the syllabus:

> Such testimony as to a statement or declaration *may be* admissible under an exception to the hearsay rule for spontaneous exclamations where the trial judge reasonably finds (a) that there was some occurrence startling enough to produce a nervous excitement in the declarant, which was sufficient to still his reflective faculties and thereby make his statements and declaration the unreflective and sincere expression of his actual impressions and beliefs, and thus render his statement or declaration spontaneous and unreflective, (b) that the statement or declaration, even if not strictly contemporaneous with its exciting cause, was made before there had been time for such nervous excitement to

> lose a domination over his reflective faculties, so that such domination *continued* to remain sufficient to make his statements and declarations the unreflective and sincere expression of his actual impressions and beliefs, (c) that the statement or declaration related to such startling occurrence or the circumstances of such startling occurrence, and (d) that the declarant had an opportunity to observe personally the matters asserted in his statement or declaration.

(Emphasis sic).

**{¶ 30}** Appellant first claims the trial court erred in admitting Alicia's statements made in the 5:33 a.m. call. Appellant maintains these statements do not qualify as excited utterances since "they do not meet the four criteria to qualify as excited utterances." (Appellant's Brief, 11.) Appellant specifically avers "it is clear from listening to the call that either Ms. Jenkins was not startled enough to produce nervous excitement, or she was no longer under the stress of the excitement of the event." (Appellant's Brief, 10.) Appellant asserts that during the call, Alicia is "very polite," "speaks calmly in a very matter-of-fact manner," and is "not screaming, crying, or otherwise acting nervous or under stress." (Appellant's Brief, 11.)

**{¶ 31}** We note initially that 911 calls are generally admissible as excited utterances. *See State v. Gray*, 10th Dist. No. 06AP-15, 2007-Ohio-1504, ¶ 11; *State v. Johnson*, 10th Dist. No. 08AP-652, 2009-Ohio-3383, ¶ 22. Appellant's attempt to distinguish this call from a 911 call on grounds that it was made to a non-emergency police number rather than 911 is unavailing. Alicia called for police assistance in dealing with an intruder in her home. That she called a non-emergency police number rather than 911 is a distinction without a difference.

**{¶ 32}** Moreover, pursuant to *Taylor*, Alicia's statements meet the criteria for admissibility as an excited utterance. Appellant's act of kicking in the front door to Alicia's apartment at 5:33 a.m. constitutes a startling event, and her call to police was made within moments of appellant's intrusion into the apartment, before there was time for such nervous excitement to lose domination over her reflective faculties. Indeed, Alicia reported that appellant was standing in her living room at the time. The statements related to this startling occurrence, and Alicia had an opportunity to observe the matters asserted in her statement. The fact that Alicia was able to cogently report what was

happening without crying or screaming does not establish that she was not startled enough to produce nervous excitement or that she was no longer under the stress of the excitement of the event. Alicia was obviously under the stress of the event when she called the police. She identified appellant as an "intruder" and averred he was "refusing to leave." (Tr. 52, State's exhibit No. 19.) Moreover, unlike a situation where a break-in by an unknown intruder might well result in a more emotionally-charged call to police, Alicia was well-acquainted with appellant. The trial court reviewed the call and thus was able to listen to the tone and tenor of Alicia's voice. The court concluded that Alicia's statements met the excited-utterance exception. We find no abuse of discretion in the trial court's admission of Alicia's first call.

**{¶ 33}** Appellant next asserts the trial court erred in admitting the statements Anthony and Alicia made in Anthony's 7:16 a.m. call to 911. Appellant first claims the state provided insufficient foundational evidence to admit the statements because the female voice in the background was never identified as belonging to Alicia.

**{¶ 34}** "Evid.R. 901 governs the authentication of demonstrative evidence such as recordings of telephone conversations. The threshold for admission is quite low as the proponent need only submit 'evidence sufficient to support a finding that the matter in question is what its proponent claims.' Evid.R. 901(A). This means, 'the proponent must present foundational evidence that is sufficient to constitute a rational basis for a jury to decide that the primary evidence is what its proponent claims it to be.' * * * A proponent may demonstrate genuineness or authenticity through direct or circumstantial evidence." *State v. Tyler*, 196 Ohio App.3d 443, 2011-Ohio-3937, ¶ 25 (4th Dist.), quoting *State v. Payton*, 4th Dist. No. 01CA2606 (Jan. 25, 2002). Evid.R. 901(B)(5) specifically allows voice authentication by "[i]dentification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it to the alleged speaker."

**{¶ 35}** In the present case, although there was no direct testimony offered by Shelton to the effect that he recognized the female voice on Anthony's 911 call as that of Alicia, the jury had just moments before heard Alicia's voice on the recording of her 5:33 a.m. call. That recording was sufficient to constitute a rational basis for a jury to decide that the female voice on Anthony's 911 call matched that of Alicia in the 5:33 a.m. call.

Moreover, Anthony referred to the female heard in the background as "Sis." (Tr. 54, State's exhibit No. 19.) As noted above, Shelton identified the male voice on the call as that of his son Anthony, and he testified that Anthony and Alicia were siblings. In addition, Shelton testified that Anthony went with him to repair Alicia's door, and the address Anthony provided to the 911 dispatcher matched Alicia's address. The foregoing provides sufficient foundational evidence to admit Anthony's 911 call.

**{¶ 36}** Appellant next argues that the statements made by Anthony and Alicia constituted inadmissible double hearsay. Appellant specifically avers that "[m]uch of the call consisted of Mr. Jenkins asking the unidentified female questions and then relaying the answer to the [911] operator. This additional layer of hearsay must also conform to the excited utterance or other hearsay exception to be admissible and it did not. Evid.R. 805." (Appellant's Brief, 12.)

**{¶ 37}** "Pursuant to Evid.R. 805, hearsay within hearsay is admissible if each part of the combined statements conforms to an exception to the hearsay rule." *Worth* at ¶ 21. Both Alicia's statements to Anthony and Anthony's subsequent relaying of those statements to the 911 dispatcher qualify as excited utterances. As noted above, 911 calls are generally admissible as excited utterances. Here, the statements were made contemporaneously with the startling event of appellant kicking in the door to Alicia's apartment a second time. As can be heard from their conversation with each other and in Anthony's statements to the 911 dispatcher, both Anthony and Alicia were excited and under the stress of the event, and there is no indication that the statements were the result of reflective thought.

**{¶ 38}** Lastly, appellant contends the statements lacked relevance and, thus, were inadmissible. Evid.R. 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Generally, all relevant evidence is admissible. "Evidence which is not relevant is not admissible." Evid.R. 402.

**{¶ 39}** Appellant first maintains the statements made by the woman in the background of the call were irrelevant because that woman's identity was never established. Appellant claims that "[w]ithout knowing her identity, the information she is

providing is not relevant as there is no connection to be made with the statements being made to anyone involved in the case." (Appellant's Brief, 12-13.) Appellant's contention is without merit, as we have already determined that sufficient foundational evidence existed to identify the female caller as Alicia.

**{¶ 40}** Appellant also claims the statements were irrelevant because they contained no reference to appellant. In her 5:33 a.m. call, Alicia identified appellant as the "intruder" who kicked in her door. (Tr. 52, State's exhibit No. 19.) In the 7:16 a.m. call, both Alicia and Anthony stated, "he's back." (Tr. 54, State's exhibit No. 19.) Taking these calls together, the jury could reasonably infer that the "he" to whom Alicia and Anthony referred was appellant. Statements made during the call regarding appellant's actions were clearly relevant to the determination of the action. Evid.R. 401.

**{¶ 41}** Finally, appellant maintains the trial court erred in admitting the statements Alicia made in her 7:21 a.m. call to 911. Appellant argues that the tone and tenor of Alicia's voice demonstrates only that she was angry, not fearful. Appellant also points to Alicia's ability to describe in detail what appellant was wearing and her failure to provide a description of appellant's car until she was prompted by the 911 dispatcher. Appellant contends this evidence establishes that Alicia was not suffering from a nervous excitement sufficient to cause her to lose domination over her reflective faculties. We disagree.

**{¶ 42}** Once again, we reiterate that 911 calls are generally admissible as excited utterances. Moreover, the evidence does not support the conclusion that Alicia was only angry and not suffering from a nervous excitement. Alicia called 911 and requested immediate police assistance. Alicia reported that appellant had just kicked in the door to her apartment, slapped her, and "put his hands on" her brother, thus establishing that the situation involved violence. (Tr. 56, State's exhibit No. 19.) Further, Alicia stated that appellant was still present at the scene, so the emergency was ongoing. Moreover, Alicia's ability to describe appellant's clothing does not demonstrate that she was not suffering from a nervous excitement. As noted, appellant was still present when Alicia provided the description.

**{¶ 43}** Finally, the fact that Alicia initially told the 911 dispatcher she did not know what type of vehicle appellant was driving does not establish that her subsequent

statement describing appellant's vehicle was the product of reflective thought. Once the dispatcher explained the importance of a vehicle description, Alicia described the vehicle she saw appellant driving earlier that morning. She did not state with certainty what appellant was driving prior to kicking in the door the second time. Rather, she stated only that she saw him driving a gray Mountaineer earlier that morning and that was the vehicle "he has to be driving." (Tr. 57, State's exhibit No. 19.) Upon learning the importance of this information, it made sense that Alicia elaborated on what she did know.

**{¶ 44}** For all the foregoing reasons, we conclude the trial court did not abuse its discretion in admitting the statements made in the three recorded telephone calls under Ohio evidentiary rules pursuant to the hearsay exception for excited utterances.

**{¶ 45}** Appellant next contends that admission of the statements violated his right to confront the witnesses against him as guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution. We review the question of whether the trial court violated appellant's Confrontation Clause rights under a de novo standard. *State v. Durdin*, 10th Dist. No. 14AP-249, 2014-Ohio-5759, ¶ 15, citing *State v. Rinehart*, 4th Dist. No. 07CA2983, 2008-Ohio-5770, ¶ 20; *McClain* at ¶ 16, citing *State v. Dennison*, 10th Dist. No. 12AP-718, 2013-Ohio-5535, ¶ 61.

**{¶ 46}** "The Sixth Amendment's Confrontation Clause provides that, '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.' " *Crawford v. Washington*, 541 U.S. 36, 42 (2004). This "bedrock procedural guarantee applies to both federal and state prosecutions." *Id.*, citing *Pointer v. Texas*, 380 U.S. 400, 406 (1965). " 'Section 10, Article I [of the Ohio Constitution] provides no greater right of confrontation than the Sixth Amendment.' " *State v. Arnold*, 126 Ohio St.3d 290, 2010-Ohio-2742, ¶ 12, quoting *State v. Self*, 56 Ohio St.3d 73, 79 (1990).

**{¶ 47}** In *Crawford*, the United States Supreme Court considered whether the introduction of hearsay statements admissible under state law violated an accused's Sixth Amendment right to confront the witnesses against him. The statements at issue were made in a recorded formal police interrogation. The recorded statements were played for the jury at a trial in which the declarant did not testify. The court held the Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial

unless he was unavailable to testify and the defendant had had a prior opportunity for cross-examination." *Id.* at 53-54. Although the court did not expressly define "testimonial," it stated that the core class of testimonial statements includes ex parte in-court testimony or its functional equivalent, extrajudicial statements contained in formalized testimonial materials such as affidavits and depositions, "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," and "[s]tatements taken by police officers in the course of interrogations." *Id.* at 52. The court further stated that the Confrontation Clause does not apply to nontestimonial hearsay. *Id.* at 68.

**{¶ 48}** Later, in *Davis v. Washington*, 547 U.S. 813 (2006), the court considered whether a caller's responses to a 911 dispatcher's interrogation were testimonial when the caller failed to appear to testify at trial. The court held that "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id.* at 822. The court assumed, without deciding, that the acts of a 911 operator constituted acts of police. *Id.* at 823, fn. 2. The court concluded the 911 caller's hearsay statements were not testimonial and were therefore not barred by the Sixth Amendment. *Id.* at 829. In so concluding, the court reasoned that (1) the statements described the events as they were actually happening, rather than explaining events that had happened in the past, (2) any reasonable listener would conclude the statements were made in the face of an ongoing emergency, (3) the interrogation was objectively necessary to resolve the ongoing emergency, rather than simply to learn what had happened in the past, and (4) the interrogation was informal because it was conducted over the telephone and the answers were provided frantically while in a chaotic and unsafe environment. *Id.* at 827. The court averred the circumstances surrounding the interrogation "objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency. [The caller] simply was not acting as a *witness*; she was not *testifying*." (Emphasis sic.) *Id.* at 828. The Supreme Court of Ohio adopted the

*Davis* primary-purpose test in *State v. Siler*, 116 Ohio St.3d 39, 2007-Ohio-5637, paragraph one of the syllabus.

**{¶ 49}** Appellant first contends the statements Alicia made in her first call at 5:33 a.m. were testimonial and, thus, barred by the Confrontation Clause. Specifically, appellant claims the statements fail the second prong of the primary-purpose test "because a reasonable listener would not conclude that [she] was facing an ongoing emergency." (Appellant's Brief, 18.) Appellant generally reiterates the same arguments presented in his challenge to the admission of the statements under the rules of evidence, i.e., that Alicia called a non-emergency police number and she spoke in a calm, matter-of-fact manner. The fact that Alicia called a non-emergency number rather than 911 does not establish there was no ongoing emergency. Alicia called a valid police telephone number and requested officer assistance. Her statements demonstrate that the situation was an emergency. She identified appellant as an "intruder" and reported that he had just kicked in her door and refused to leave. Further, her speaking in a calm manner does not mean there was no ongoing emergency. As we stated above, unlike a situation where a break-in by an unknown intruder might well result in a more emotionally-charged call to police, Alicia was well-acquainted with appellant. The trial court reviewed the call and, thus, was able to listen to the tone and tenor of Alicia's voice. Thus, we conclude Alicia's statements were not testimonial and, therefore, not barred by the Confrontation Clause.

**{¶ 50}** Appellant also contends the statements Alicia made in her 7:21 a.m. 911 call were testimonial and, thus, barred by the Confrontation Clause. Appellant first refers to Alicia's statement that appellant kicked in her door at 5:30 that morning. Appellant claims this statement fails the first prong of the primary-purpose test because she "is describing events that happened in the past." (Appellant's Brief, 21.) We disagree. Alicia made the statement in response to the 911 dispatcher's question about what was happening. In an effort to explain the urgency of the current situation and to convince the 911 dispatcher to send the police, Alicia needed to provide some background information regarding appellant's earlier actions. Alicia's statement was not made to prove a past event, but to explain the full nature of her current emergency.

**{¶ 51}** Appellant next cites Alicia's later statement that she and her family were outside and away from appellant. Appellant claims this statement fails the second prong

of the primary-purpose test because "a reasonable listener would not conclude that she was facing an ongoing emergency." (Appellant's Brief, 21.) Again, we disagree. We first note that Alicia did not state that she and her family were away from appellant. To the contrary, she averred "he's still here." (Tr. 57, State's exhibit No. 19.) Appellant's continued presence at the scene after twice kicking in Alicia's doors and assaulting both Alicia and Anthony arguably establishes an ongoing emergency. This conclusion is buttressed by the 911 dispatcher's admonition to stay away from appellant. Thus, we conclude Alicia's statements were not testimonial and, therefore, not barred by the Confrontation Clause.

**{¶ 52}** The first assignment of error is overruled.

**B. Second Assignment of Error**

**{¶ 53}** In his second assignment of error, appellant contends the trial court erroneously precluded defense counsel from effectively cross-examining Officer Dawson about the nature of his prior contacts with appellant. Appellant also contends he was denied a fair trial when the court denied his request for a sidebar.

**{¶ 54}** As noted above, the prosecutor called Officer Dawson as a witness to authenticate appellant's voice on the recorded jailhouse call. Officer Dawson averred he was familiar with appellant's voice because he had spoken at length with him during "three to four" previous encounters. (Tr. 100.) Defense counsel did not object to this testimony. However, on cross-examination, defense counsel attempted to question Officer Dawson about his previous encounters with appellant. Specifically, defense counsel asked, "[y]ou weren't arresting him all of those times, correct?" (Tr. 105.) The prosecutor objected on relevance grounds, and the trial court sustained the objection. Defense counsel then asked, "[c]an I explain -- can we approach?" (Tr. 105.) The trial court responded, "It's sustained. No. It's sustained." (Tr. 105.) Appellant contends the trial court's ruling deprived him of meaningful cross-examination because Officer Dawson's direct testimony left a false impression with the jury that appellant had been arrested or was subject to investigation on three to four occasions by Officer Dawson.

**{¶ 55}** Cross-examination is permitted on all relevant matters and on matters affecting credibility. Evid.R. 611(B). A trial court has discretion to limit the scope of cross-examination taking into account the particular facts of a case. *State v. Bone*, 10th

Dist. No. 05AP-565, 2006-Ohio-3809, ¶ 49, citing *State v. Treesh*, 90 Ohio St.3d 460, 480-81 (2001). Thus, a trial court has wide latitude to impose reasonable limits on cross-examination based on concerns of harassment, prejudice, confusion of the issues, witness safety or interrogation that is repetitive or only marginally relevant. *Id.*, citing *Treesh* at 480-81, citing *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986). Accordingly, a reviewing court " 'should be slow to disturb a trial court's determination on the scope of cross-examination unless the trial court has abused its discretion and the party illustrates a material prejudice.' " *Id.*, quoting *State v. Hodge*, 10th Dist. No. 04AP-294, 2004-Ohio-6980, ¶ 10, citing *Reinoehl v. Trinity Universal Ins. Co.*, 130 Ohio App.3d 186, 194 (10th Dist.1998). Further, the decision to grant or deny a sidebar also lies within the trial court's discretion. *State v. Abi-Abdallah*, 8th Dist. No. 73007 (Oct. 22, 1998), citing *State v. Larson*, 8th Dist. No. 63001 (Nov. 10, 1993).

**{¶ 56}** The trial court properly sustained the prosecutor's objection because the nature of Officer Dawson's encounters with appellant was not pertinent to the facts of this case. The prosecutor questioned Officer Dawson about his previous contacts with appellant to lay a foundation for his familiarity with appellant's voice so that he could identify appellant's voice in the jailhouse call. It was within the trial court's discretion whether to allow defense counsel to further delve into this collateral issue.

**{¶ 57}** Moreover, even if the trial court abused its discretion in limiting cross-examination and denying a sidebar, such error was not prejudicial. The jury had knowledge of appellant's extensive criminal history; thus, he suffered no prejudice in the fact that appellant may have been investigated three to four times by a single officer.

**{¶ 58}** The second assignment of error is overruled.

**C. Third Assignment of Error**

**{¶ 59}** In his third assignment of error, appellant claims the trial court abused its discretion in admitting evidence of appellant's prior felony convictions. Appellant contends that the danger of unfair prejudice outweighed the probative value of this evidence.

**{¶ 60}** Prior to the presentation of appellant's case, defense counsel made an oral motion in limine requesting that the trial court prohibit the state's use of appellant's prior

felony convictions for impeachment purposes on cross-examination. The trial court held the matter in abeyance pending the state's attempted use of those prior convictions.

**{¶ 61}** During cross-examination of appellant, the prosecutor asked if he had "come before the Common Pleas Court before and enter[ed] admissions." (Tr. 151.) Defense counsel objected on grounds that cross-examination about appellant's prior convictions for impeachment purposes created a risk of unfair prejudice which outweighed any probative value regarding appellant's truthfulness because none of the prior convictions involved issues of veracity. The prosecutor responded that appellant's prior felony convictions were admissible under Evid.R. 609 and not unduly prejudicial because "this individual is, per the judgment entry, has been incarcerated, and that would affect his credibility on the stand, fearing a similar thing to occur in this particular case." (Tr. 152-53.) The trial court overruled the objection, but granted defense counsel's request for a limiting instruction regarding the forthcoming testimony about appellant's convictions. The trial court specifically instructed the jury that "there's going to be a series of questions that are asked. These are permitted * * * to show the veracity of the Defendant and not for cumulative record purposes." (Tr. 153.) Appellant thereafter testified he had prior felony convictions for aggravated assault, cocaine possession, and carrying a concealed weapon.

**{¶ 62}** Following closing arguments, the trial court advised the jury, inter alia, that evidence regarding appellant's prior felony convictions could not be considered to prove appellant's character in order to show he acted in accordance with that character and could be used only in assessing appellant's credibility and the weight to be given appellant's testimony.

**{¶ 63}** When an accused testifies at trial, Evid.R. 609(A)(2) permits the prosecution to impeach the accused's credibility with evidence that the accused was convicted of an offense punishable by death or imprisonment in excess of one year and if the court determines that the probative value of the evidence outweighs the danger of unfair prejudice, of confusion of the issues, or of misleading the jury. *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, ¶ 132. The decision whether to admit evidence under Evid.R. 609(A)(2) is left to the sound discretion of the trial court, and a reviewing court may not reverse such decision absent an abuse of that discretion. *State v. Williams*, 2d

Dist. No. 24149, 2011-Ohio-4726, ¶ 60, citing *State v. Lawson*, 2d Dist. No. 23456, 2010-Ohio-3114, ¶ 17.

**{¶ 64}** Appellant does not argue that his prior convictions were not punishable by imprisonment in excess of one year. Accordingly, we need only consider whether the probative value of appellant's convictions outweighed the danger of unfair prejudice. Although appellant's prior convictions were of limited probative value as related to his guilt on the present charges, the convictions were probative as to the issue of his credibility, which was at issue when he testified. *See State v. Mayes*, 12th Dist. No. CA99-01-002 (Dec. 30, 1999). With regard to prejudice, " '[t]he existence of a prior offense is such an inflammatory fact that ordinarily it should not be revealed to the jury unless specifically permitted under statute or rule. The undeniable effect of such information is to incite the jury to convict based on past misconduct rather than restrict their attention to the offense at hand.' " *State v. Topping*, 4th Dist. No. 11CA6, 2012-Ohio-5617, ¶ 43, quoting *State v. Allen*, 29 Ohio St.3d 53, 55 (1987). We thus acknowledge appellant's valid concern that there is some danger that the jury presumed guilt on the present felony charges simply because he was previously convicted of other felonies.

**{¶ 65}** However, given the broad discretion afforded trial courts in determining the admissibility of evidence under Evid.R. 609, we do not find an abuse of discretion in this case. The prosecutor was permitted under Evid.R. 609(A)(2) to question appellant about his prior convictions for the purpose of impeaching his credibility. "Generally, a prosecutor can cross-examine as to ' "the name of the crime, the time and place of conviction, and sometimes the punishment." ' " *Bryan* at ¶ 132, quoting 1 Giannelli & Snyder, Evidence (2d Ed.2001), Section 609.15. "However, ' "details such as the victim's name and the aggravating circumstances" ' are not permissible." *Id.* Here, the prosecutor did not elicit any details about appellant's prior convictions beyond that permitted. *See Williams* at ¶ 61. Moreover, in both the limiting instruction immediately preceding the prosecutor's questions and in its jury instructions following closing arguments, the trial court instructed the jury regarding the proper use of testimony regarding appellant's prior convictions. We presume the jury followed these instructions. *State v. Mammone*, 139 Ohio St.3d 467, 2014-Ohio-1942, ¶ 147; *State v. Jones*, 90 Ohio St.3d 403, 414 (2000).

**{¶ 66}** The third assignment of error is overruled.

**D. Fourth Assignment of Error**

**{¶ 67}** In his fourth assignment of error, appellant alleges three instances of prosecutorial misconduct during closing arguments. Appellant maintains the prosecutor's transgressions deprived him of a fair trial in contravention of the United States and Ohio Constitutions.

**{¶ 68}** The test for prosecutorial misconduct is whether the prosecutor's conduct was improper, and, if so, whether it prejudicially affected the substantial rights of the accused. *State v. Smith*, 14 Ohio St.3d 13, 14 (1984). " ' "The 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 *State v. Hairston*, 10th Dist. No. 01AP-252 (Sept. 28, 2001), quoting *Smith v. Phillips*, 455 U.S. 209, 219 (1982). Prosecutorial misconduct thus is not grounds for reversal unless the accused has been denied a fair trial. *State v. Maurer*, 15 Ohio St.3d 239, 266 (1984).

**{¶ 69}** A prosecutor is entitled to a certain degree of latitude in closing argument. *State v. Grant*, 67 Ohio St.3d 465, 482 (1993), citing *State v. Richey*, 64 Ohio St.3d 353, 362 (1992). We review the prosecutor's summation in its entirety to determine if the allegedly improper remarks prejudicially affected the accused's substantial rights. *State v. Loughman*, 10th Dist. No. 10AP-636, 2011-Ohio-1893, ¶ 24, citing *Treesh* at 466.

**{¶ 70}** We note initially that defense counsel did not object to any portion of the prosecutor's closing arguments, so any error is forfeited absent plain error. *Id.* at ¶ 18, citing *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, ¶ 139. "A court recognizes plain error with the utmost caution, under exceptional circumstances, and only to prevent a miscarriage of justice." *Id.* We may reverse only when the record clearly demonstrates that the accused would not have been convicted absent the improper conduct. *Id.* Moreover, the trial court instructed the jury that closing arguments were not evidence; we thus presume the jury followed the instruction and did not consider the closing arguments as evidence. *Id.* at ¶ 23, citing *State v. Trewartha*, 10th Dist. No. 05AP-513, 2006-Ohio-5040, ¶ 21.

**{¶ 71}** Appellant first claims the prosecutor denigrated defense counsel. "It is improper to denigrate defense counsel in the jury's presence." *State v. Davis*, 116 Ohio

St.3d 404, 2008-Ohio-2, ¶ 304, citing *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, ¶ 167.

**{¶ 72}** Appellant alleges the prosecutor disparaged defense counsel by stating "sometimes lawyers want to take words and change them into things they don't mean." (Appellant's Brief, 35, citing Tr. 187.) We review this comment in its appropriate context.

**{¶ 73}** In his closing argument, defense counsel noted appellant's testimony that he lived at 1842 Noe-Bixby Road and argued that there was no direct evidence that appellant did not live there. Counsel then commented, "[y]ou know, nobody sat there and said, X is the owner of the property, 1842 Noe-Bixby Road. They haven't presented evidence on that specific issue." (Tr. 175.) In rebuttal, the prosecutor averred, "[i]t's [Alicia's] house, it's [Alicia's] apartment. This is sort of sometimes I think the absurdity about why people don't like attorneys. 'Cause, you know, you have a burglary, right, it's the property of another or the residence of another. * * * [W]hat if I stood up here and said, well, technically, I think the property company owns that property, Miss Jenkins doesn't, she's just a tenant, it's not her property. I would hope that you would think that would be an absurd argument because that's not the law. So sometimes lawyers want to take words, change them into things that they don't mean." (Tr. 186-87.)

**{¶ 74}** A prosecutor's isolated comments should not be taken out of context and given their most damaging meaning. *State v. Hill*, 75 Ohio St.3d 195, 204 (1996). Further, a prosecutor may respond to the specifics of defense counsel's closing arguments. *Loughman* at ¶ 40. Here, the prosecutor made the comment only in response to defense counsel's contention that the state had failed to present evidence establishing that Alicia owned or leased the property. We fail to see how the challenged comment disparaged defense counsel; thus, no plain error occurred.

**{¶ 75}** Appellant also contends the prosecutor denigrated defense counsel by referring to two arguments defense counsel would likely present as "red herrings." The prosecutor first noted that defense counsel would likely point out that Alicia did not testify at trial. The prosecutor noted that the victim's testimony was not required and urged the jury not to "follow that red herring." (Tr. 161.) Later, the prosecutor stated that the "other red herring" defense counsel would likely present was that because appellant had some personal items at Alicia's apartment, that meant he lived there. (Tr. 163.)

**{¶ 76}** In *State v. Jones*, 2d Dist. No. 18789 (Apr. 12, 2002), the defendant challenged the prosecutor's comments referring to defense counsel's arguments as "blow[ing] smoke" and "rais[ing] red herrings." The court concluded the prosecutor's comments were not prejudicial because their purpose was to refocus the jury's attention on the evidence presented in the case. In *State v. Bevins*, 1st Dist. No. C-050754, 2006-Ohio-6974, the defendant argued that the prosecutor improperly denigrated defense counsel by stating that "the defense here is trying to divert your attention or cloud the issue." *Id.* at ¶ 40. The court found that the prosecutor's comment did not constitute a "derogatory personal reference to defense counsel." *Id.* at ¶ 43. Rather, the court found that the prosecutor "simply pointed out that defense counsel was trying to direct the jury's attention elsewhere." *Id.* As in *Jones* and *Bevins*, the purpose of the prosecutor's "red herring" comments was not to disparage defense counsel, but to refocus the jury's attention to the evidence presented in the case and to point out that defense counsel was trying to direct the jury's attention elsewhere. *See also State v. Jones*, 1st Dist. No. C-070666, 2008-Ohio-5988, ¶ 22 (comment by prosecutor that defense was throwing out red herrings did not constitute misconduct); *State v. Smith*, 8th Dist. No. 86690, 2006-Ohio-3156, ¶ 53 (prosecutor's comments urging the jury to look beyond the "smoke screens" and "red herrings" did not improperly attack defense counsel's honesty).

**{¶ 77}** Moreover, even if the prosecutor's comments in some way disparaged defense counsel, they did not result in plain error. There is no reasonable basis to conclude that the result of the trial would have been different absent these comments.

**{¶ 78}** Appellant next asserts the prosecutor improperly expressed his opinion as to appellant's credibility. Appellant specifically references the comment that "[t]here's no information to suggest, except from Mr. Canada, that at any time he was living or staying [at 1842 Noe-Bixby Road]." (Tr. 163.) Appellant contends this comment "implies that Appellant was lying and substitutes the prosecuting attorney's own judgment for that of the jury." (Appellant's Brief, 36.)

**{¶ 79}** "When making a closing argument, a prosecutor should not express his personal belief or opinion on the credibility of a witness." *Jones*, 2d Dist. No. 18789, citing *Smith*, 14 Ohio St.3d at 14. However, a prosecutor "may draw reasonable inferences from the evidence presented at trial, and may comment on those inferences during closing

argument." *Treesh* at 466, citing *State v. Smith*, 80 Ohio St.3d 89, 111 (1997). Further, "[t]he prosecutor may comment fairly on the credibility of witnesses based on their in-court testimony, or may even suggest to a jury that the evidence demonstrated that the witness was lying." *Jones*, 2d Dist. No. 18789. "It is not prosecutorial misconduct to characterize a witness as a liar or a claim as a lie if the evidence reasonably supports the characterization." *State v. Stroud*, 2d Dist. No. 18713 (Feb. 15, 2002), citing *State v. Gunn*, 2d Dist. No. 16617 (Aug. 7, 1998).

**{¶ 80}** Here, the prosecutor did not express his personal belief or opinion on appellant's veracity; he merely pointed out that appellant's testimony was the only evidence establishing that he lived at the Noe-Bixby Road apartment. Immediately prior to the challenged comment, the prosecutor noted Officer Dawson's testimony that appellant's arrest documentation established an address of 45 Stevens Avenue. This conflicting evidence reasonably supports the prosecutor's suggestion that appellant's testimony was untruthful. Moreover, in light of the trial court instructing the jury members that they were "the sole judges of the facts, the credibility of the witnesses, and the weight of the evidence," the prosecutor's statement, if error, fails to rise to the level of plain error. (Tr. 192.)

**{¶ 81}** Lastly, appellant alleges two instances where the prosecutor made reference to facts not in evidence. The first of these instances concerns the prosecutor's comment about Alicia being "dead in a ditch." (Tr. 182.)

**{¶ 82}** In his closing argument, defense counsel repeatedly noted that neither Alicia nor Anthony testified at trial. Defense counsel speculated that "they were concerned and they did not want to sit there and commit perjury" or "didn't want to sit there and admit that they committed a crime by lying to the police in the past." (Tr. 169.) In his rebuttal argument, the prosecutor averred, "[y]ou heard from the detective that they have capiases out, right, they have warrants, they didn't come to court. The detective is trying to find them. She could be dead in a ditch. She could be on vacation. It doesn't matter. And I ask that you not speculate as to why she's not here." (Tr. 182-83.)

**{¶ 83}** Appellant argues that the prosecutor's remark that Alicia "could be dead in a ditch" insinuated that she "may have met an unfortunate end" and was not based on any evidence presented at trial. (Appellant's Brief, 37.) Appellant avers the prosecutor "was

attempting to play on the jury's passions and sympathies as opposed to focusing on the facts and testimony presented in the case." (Appellant's Brief, 37.)

**{¶ 84}** As noted above, a prosecutor's isolated remark should not be taken out of context and given its most damaging meaning. *Hill* at 204. We note the prosecutor's alternative proposition that Alicia may have failed to appear at trial because she was on vacation. It can hardly be suggested that this comment was made to garner sympathy from the jury. Taken in context, it is clear the prosecutor made the comment solely in response to defense counsel's insinuation that Alicia did not testify because she did not want to commit perjury or admit that she lied to the police, and to counsel the jury that it would be improper to speculate about why Alicia did not testify. As previously noted, a prosecutor may respond to the specifics of defense counsel's closing arguments. *Loughman* at ¶ 40. We perceive no real danger that the jury would conclude from the prosecutor's comment that Alicia had "met an unfortunate end." Thus, no plain error occurred.

**{¶ 85}** Finally, appellant takes issue with the prosecutor referring to the case as a "special victims unit" case. (Tr. 161.) Appellant contends that no evidence supported this statement, and the statement created the inference that the case was of "heightened importance" in an effort to "enrage the jurors against Appellant." (Appellant's Brief, 37-38.)

**{¶ 86}** Appellant has not advanced any case law or other authority establishing that a prosecutor's characterization of a case as a "special victims unit" case constitutes prosecutorial misconduct. Further, we cannot find that this isolated comment, when viewed in the context of the summation in its entirety, amounted to plain error prejudicially affecting appellant's substantial rights.

**{¶ 87}** Appellant's fourth assignment of error is overruled.

**E. Fifth Assignment of Error**

**{¶ 88}** In his fifth assignment of error, appellant contends he was denied the effective assistance of counsel in violation of his constitutional rights under the United States and Ohio Constitutions. We disagree.

**{¶ 89}** "The Sixth Amendment to the United States Constitution guarantees a criminal defendant the effective assistance of counsel." *State v. Belmonte*, 10th Dist. No.

10AP-373, 2011-Ohio-1334, ¶ 8, citing *McMann v. Richardson*, 397 U.S. 759, 771 (1970). Courts employ a two-step process in determining whether the right to effective assistance of counsel has been violated. *Id.*, citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The defendant must first demonstrate that counsel's performance was deficient. This requires showing counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment. The defendant must then demonstrate that the deficient performance prejudiced the defense. This requires showing counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Id.*, citing *Strickland*.

**{¶ 90}** "An attorney properly licensed in the state of Ohio is presumed competent." *Belmonte* at ¶ 9, citing *State v. Lott*, 51 Ohio St.3d 160, 174 (1990). The defendant bears the burden of proof and must overcome the strong presumption that counsel's performance was adequate or that counsel's action might be considered sound trial strategy. *Id.*, citing *State v. Smith*, 17 Ohio St.3d 98, 100 (1985). In demonstrating prejudice, the defendant must prove that there exists a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Id.*, citing *State v. Bradley*, 42 Ohio St.3d 136 (1989), paragraph three of the syllabus.

**{¶ 91}** Appellant contends his counsel was ineffective in failing to object during the prosecutor's closing arguments when the prosecutor denigrated defense counsel, expressed his personal opinion as to appellant's credibility, and made reference to facts not in evidence. " 'Judicial scrutiny of counsel's performance must be highly deferential' as 'the challenged action "might be considered sound trial strategy." ' " *Loughman* at ¶ 63, quoting *Strickland* at 689. "The 'failure to make objections does not constitute ineffective assistance of counsel *per se*, as that failure may be justified as a tactical decision.' " *Id.*, quoting *State v. Gumm*, 73 Ohio St.3d 413, 428 (1995).

**{¶ 92}** We determined under appellant's fourth assignment of error that the prosecutor's statements made during closing arguments did not prejudicially affect appellant's substantial rights. Accordingly, even if appellant can establish that counsel should have objected, he cannot demonstrate the requisite prejudice to demonstrate ineffective assistance of counsel. *See id.* at ¶ 64, citing *State v. Dennis*, 10th Dist. No. 08AP-369, 2008-Ohio-6125, ¶ 29.

**{¶ 93}** The fifth assignment of error is overruled.

**F. Sixth Assignment of Error**

**{¶ 94}** In his sixth assignment of error, appellant contends the cumulative effect of the trial court's erroneous evidentiary rulings and prosecutorial misconduct in closing arguments deprived him of a fair trial under the United States and Ohio Constitutions.

**{¶ 95}** "Under the doctrine of accumulated error, a conviction will be reversed when the cumulative effect of errors in a trial deprives a defendant of a fair trial even though each of the instances of trial-court error does not individually constitute cause for reversal." *State v. Pickens*, 141 Ohio St.3d 462, 2014-Ohio-5445, ¶ 230, citing *State v. DeMarco*, 31 Ohio St.3d 191 (1987), paragraph two of the syllabus; *see also State v. Kirkland*, 140 Ohio St.3d 73, 2014-Ohio-1966, ¶ 140. "Errors which are separately harmless can, when considered together, violate an accused's right to a fair trial." *State v. Norman*, 10th Dist. No. 12AP-505, 2013-Ohio-1908, ¶ 61, citing *State v. Madrigal*, 87 Ohio St.3d 378, 397 (2000). However, "the doctrine of cumulative error is not applicable to cases where there has not been a finding of multiple instances of harmless error." *Id.* at ¶ 61, citing *State v. Skerness*, 5th Dist. No. 09-CA-28, 2011-Ohio-188, ¶ 77.

**{¶ 96}** As stated in our discussion of appellant's first, second, third, and fourth assignments of error, we have rejected appellant's contentions that error occurred in the trial court's evidentiary rulings or the prosecutor's conduct in closing arguments. Accordingly, the doctrine of cumulative error is inapplicable. *See id.* at ¶ 63; *State v. Hudson*, 10th Dist. No. 13AP-702, 2014-Ohio-1712, ¶ 24.

**{¶ 97}** The sixth assignment of error is overruled.

**G. Seventh Assignment of Error**

**{¶ 98}** In his seventh assignment of error, appellant contends his convictions for aggravated burglary and domestic violence were not supported by sufficient evidence and were against the manifest weight of the evidence.

**{¶ 99}** "In a criminal prosecution, the state bears the burden of proof with respect to each statutory element of an offense." *Abi-Adballah*. The standard for evaluating whether the state has presented sufficient evidence is " 'whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.' " *State v.*

*Robinson*, 124 Ohio St.3d 76, 2009-Ohio-5937, ¶ 34, quoting *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus. Whether the evidence is legally sufficient to sustain a verdict is a question of law, not fact. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). On review for sufficiency, courts do not assess whether the state's evidence is to be believed, but whether, if believed, the evidence would support a conviction. *Id.* at 390. In determining the sufficiency of the evidence, an appellate court must give " 'full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.' " *State v. Gordon*, 10th Dist. No. 10AP-1174, 2011-Ohio-4208, ¶ 5, quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). "Consequently, a verdict will not be disturbed based upon insufficient evidence unless, after viewing the evidence in a light most favorable to the prosecution, it is apparent that reasonable minds could not reach the conclusion reached by the trier of fact." *Id.*, citing *Treesh* at 484.

**{¶ 100}** We first address appellant's claim that insufficient evidence supported his conviction for aggravated burglary. R.C. 2911.11(A) proscribes aggravated burglary and provides, in relevant part, that "[n]o person, by force, stealth, or deception, shall trespass in an occupied structure * * * when another person * * * is present, with purpose to commit in the structure * * * any criminal offense, if any of the following apply: (1) [t]he offender inflicts, or attempts or threatens to inflict physical harm on another."

**{¶ 101}** Appellant's sole contention regarding the sufficiency of the evidence is that the state failed to prove he trespassed in Alicia's apartment. "[T]respass is an essential element of aggravated burglary." *State v. O'Neal*, 87 Ohio St.3d 402, 408 (2000). Pursuant to R.C. 2911.21(A)(1), a criminal trespass occurs when a person "without privilege to do so," "[k]nowingly enter[s] or remain[s] on the land or premises of another." R.C. 2901.01(A)(12) defines "[p]rivilege" as "an immunity, license, or right conferred by law, bestowed by express or implied grant, arising out of status, position, office, or relationship, or growing out of necessity." "Land or premises" includes "any land, building, structure, or place belonging to, controlled by, or in custody of another." R.C. 2911.21(F)(2).

**{¶ 102}** Appellant cites his own testimony that he lived with Alicia and paid bills associated with the apartment, along with Shelton's testimony that he removed some of

appellant's personal belongings from Alicia's apartment after the incident and that he thought appellant paid some of Alicia's bills, as proof that appellant did not trespass in the apartment. Appellant contends the state provided no evidence contradicting this testimony other than the inadmissible hearsay testimony of Alicia and Anthony in their calls to the police. As noted in our resolution of appellant's first assignment of error, statements made in those calls were properly admitted into evidence.

**{¶ 103}** In *O'Neal,* the Supreme Court of Ohio held that "R.C. 2911.21(A)(1), when read in conjunction with R.C. 2911.21(E) [now (F)(2)], establishes that *any* person can indeed commit a trespass against property that belongs to, is controlled by, or is in the custody of, someone else." (Emphasis sic.) *Id.* at 408. Indeed, even "a spouse can be convicted of trespass and aggravated burglary in the dwelling of the other spouse who owns, has custody of, or control over the property where the crime has occurred." *Id.*, citing *State v. Lilly*, 87 Ohio St.3d 97 (1999), paragraph one of the syllabus.

**{¶ 104}** In her 5:33 a.m. call to the police station, Alicia referred to appellant as an "intruder," and reported that he "decided to come kick *my* door in and he's standing in *my* living room refusing to leave." (Emphasis added.) (Tr. 52, State's exhibit No. 19.) In his call to 911, Anthony described appellant as "an intruder." In her call to 911, Alicia again reported that appellant "kicked in *my* door at 5:30 in the morning" and "kicked in *my* back door." (Emphasis added.) (Tr. 56, State's exhibit No. 19.) Further, Officers Garrett and Dawson and Detective Rotthoff all testified that their investigations revealed no information that appellant resided at Alicia's apartment. To the contrary, appellant reported his address as 45 Stevens Avenue both when he was arrested and during his interview with police. Alicia's identification of appellant as an "intruder," her references to "my door" and "my living room," along with appellant's action in kicking in the doors and his subsequent reporting of his address as one other than 1842 Noe-Bixby Road, support the conclusion that Alicia exercised sole custody and/or control over the apartment at the time appellant entered and that appellant knowingly entered Alicia's apartment without privilege to do so, thereby committing a trespass in violation of R.C. 2911.21(A)(1). Viewing the evidence in a light most favorable to the prosecution and without making credibility determinations, we conclude the evidence was sufficient to

prove the element of trespass and, by extension, to support the conviction for aggravated burglary in violation of R.C. 2911.11(A)(1).

**{¶ 105}** Appellant also contends the evidence was insufficient to support his conviction for domestic violence. R.C. 2919.25(A) provides that "[n]o person shall knowingly cause or attempt to cause physical harm to a family or household member." As pertinent here, "[p]hysical harm" to a person means "any injury * * * regardless of its gravity or duration." R.C. 2901.01(A)(3). "Family or household member" includes a person who "has resided with an offender" and was "living as a spouse." R.C. 2919.25(F)(1)(a)(i). As pertinent here, R.C. 2919.25(F)(2) defines "[p]erson living as a spouse," as "a person who * * * has cohabited with the offender within five years prior to the date of the alleged commission of the act in question." Pursuant to R.C. 2919.25(D)(4), if an offender previously has been convicted of two or more offenses of domestic violence, then a violation of R.C. 2919.25(A) is a felony of the third degree.

**{¶ 106}** Appellant does not dispute that Alicia is a "family member" or that he previously was convicted of two offenses of domestic violence. Rather, appellant solely contends the state failed to prove he physically harmed or threatened to physically harm Alicia. Appellant argues that no evidence in the record, other than through improperly admitted testimonial hearsay, established that any physical harm occurred. Again, we note that Alicia's call to 911 was properly admitted into evidence. In that call, Alicia reported that appellant "smacked" her. (Tr. 56, State's exhibit No. 19.) Further, Officer Garrett described observing a mark on Alicia's face that suggested she had been slapped, and the state presented photographs depicting a red mark on Alicia's face. More importantly, appellant admitted in his jailhouse call that he slapped Alicia. Viewing the evidence in a light most favorable to the prosecution, and without making credibility determinations, we conclude the evidence was sufficient to prove the element of physical harm and, by extension, to support the conviction for domestic violence in violation of R.C. 2919.25(A).

**{¶ 107}** We turn next to appellant's contention that his convictions for aggravated burglary and domestic violence were against the manifest weight of the evidence. In determining whether a verdict is against the manifest weight of the evidence, an appellate court sits as a "thirteenth juror." *Thompkins* at 387. Accordingly, we review the entire

record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether the jury clearly lost its way and created a manifest miscarriage of justice. *Id.*, citing *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983). We reverse a conviction on manifest weight grounds for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Id.*, quoting *Martin* at 175.

**{¶ 108}** Appellant essentially incorporates the same arguments he made in contesting the sufficiency of the evidence to argue that his convictions are against the manifest weight of the evidence. Based on a review of the entire record, we find the jury did not clearly lose its way so as to create a manifest miscarriage of justice. While appellant testified that he lived at 1842 Noe-Bixby Road, Alicia's calls to the police arguably established he did not. Further, appellant's testimony that he did not physically harm Alicia was contradicted by Alicia's calls to the police as well as his own statements in the jailhouse call. Given the conflicting testimony, this was not the exceptional case in which the evidence weighs heavily against the convictions. Accordingly, appellant's convictions are not against the manifest weight of the evidence. *See State v. Miller*, 10th Dist. No. 10AP-1017, 2011-Ohio-3600, ¶ 24; *State v. McBride*, 10th Dist. No. 10AP-585, 2011-Ohio-1490, ¶ 32.

**{¶ 109}** The seventh assignment of error is overruled.

## IV. CONCLUSION

**{¶ 110}** Having overruled appellant's first, second, third, fourth, fifth, sixth, and seventh assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

KLATT and BRUNNER, JJ., concur.

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