

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 14AP-87 (C.P.C. No. 12CR08-4419)
Paris R. Boone,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 30, 2015

Ron O'Brien, Prosecuting Attorney, and *Laura R. Swisher*, for appellee.

Carpenter, Lipps & Leland LLP, *Kort Gatterdam* and *Erik P. Henry*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶ 1} Defendant-appellant, Paris R. Boone, appeals from a judgment of conviction entered by the Franklin County Court of Common Pleas. For the following reasons, we affirm that judgment.

I. Factual and Procedural Background

{¶ 2} On August 30, 2012, a Franklin County Grand Jury indicted Boone and a co-defendant, Vincent D. White, with counts of aggravated burglary in violation of R.C. 2911.11, aggravated robbery in violation of R.C. 2911.01, aggravated murder in violation of R.C. 2903.01, attempted murder in violation of R.C. 2923.02 and 2903.02, and felonious assault in violation of R.C. 2903.11. All of the counts contained firearm specifications pursuant to R.C. 2941.145. The charges arose from the shooting of four men inside a

house located at 1022 East 17th Avenue in Columbus, Ohio. Two of the men, Keith Paxton and Albert Thompson, died from their gunshot wounds. Miquel Williams and Juanricus Kibby survived.

{¶ 3} Boone and White entered not guilty pleas and proceeded to a jury trial. Before trial, Boone filed a motion requesting a separate trial from White. The trial court never ruled on the motion and Boone did not raise the issue again prior to the commencement of trial. Therefore, Boone and White were tried together.

{¶ 4} Kibby and Williams testified that White and Boone came to the house and that White asked to buy drugs. The house was a known drug house where drugs could be purchased. When White did not get a response, he went into the bathroom. White came out of the bathroom and immediately began firing at the victims. Neither Kibby nor Williams saw Boone fire a gun. White and Boone then ran out of the house with money and drugs they took from inside.

{¶ 5} Jeff Harris, who lived in the area and knew all the people involved in these events, testified that he had been driving around with White and Boone earlier in the day. He said that White was upset that his girlfriend was at this drug house. According to Harris, White said that he was going to go to the house and rob them. (Tr. 599.) Boone also said that he would shoot the people in the house if they moved. (Tr. 600.) Harris tried to calm White and Boone because he knew the people in the drug house and considered some of them as family. After the shooting, White called Harris and asked to come to Harris' dad's house, which was nearby. When White and Boone came inside, Harris saw that they possessed money and guns. Harris called White's brother and asked him to pick up White and Boone. Harris then left to check on the occupants of the drug house who he thought might have been shot.

{¶ 6} Both Thompson and Paxton died from their gunshot wounds. The coroner found five gunshot wounds on Thompson's body and one on Paxton's. Ballistic evidence recovered inside the house included numerous casings that were fired from two different guns, a .380 caliber handgun and a .9 mm handgun. Neither of the guns that fired these casings were ever found.

{¶ 7} In contrast to the above version of events, White testified that he went to the drug house alone to buy drugs from Kibby. Boone was not with him. While inside,

Thompson and Paxton tried to rob him and another man. During the robbery, White fired his gun to escape the house after hearing another gunshot. He fired a .380 caliber handgun six times and only hit Thompson and Kibby. He threw the gun out after the shooting. (Tr. 813.)

{¶ 8} White's brother, Terrill White, testified that he was with Boone the entire weekend of the shooting. He said that Boone's father had gone out of town for the weekend, so Boone invited a lot of people to the house and they all stayed there that weekend.

{¶ 9} The jury found Boone guilty of all counts and specifications except for two counts of aggravated murder based on prior calculation and design.¹ As to those counts, the jury found him guilty of the lesser-included offense of murder. The trial court sentenced him accordingly.

II. Boone's Appeal

{¶ 10} Boone appeals and assigns the following errors:

[1.] Appellant was denied his rights to a fair trial, to counsel, to present a defense, and to due process contrary to the Ohio and United States Constitutions when the trial court ordered appellant to wear a stun belt and shackles throughout trial without adequate justification.

[2.] The trial court's hostility toward defense counsel, resulting in disparate treatment between counsel and prosecutors and/or partiality toward the prosecution, denied appellant due process of law.

[3.] The trial court abused its discretion and denied appellant due process and a fair trial contrary to the United States and Ohio Constitutions when it denied appellant's motion to sever his case from that of his co-defendant's, resulting in prejudice to appellant when evidence that otherwise would have been inadmissible was admitted during co-defendant's case-in-chief.

¹ There were four aggravated murder charges, two predicated on prior calculation and design in violation of R.C. 2903.01(A) and the other two based on causing the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit aggravated robbery/burglary in violation of R.C. 2903.01(B).

[4.] The admission of other-acts testimony violated appellant's rights to due process and to a fair trial as guaranteed by the United States and Ohio Constitutions.

[5.] The trial court denied appellant his right to a public trial as guaranteed by the Sixth Amendment of the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution by closing the courtroom.

[6.] The trial court improperly instructed the jury on causation in violation of appellant's due process rights guaranteed by the United States and Ohio Constitutions.

[7.] The trial court erred by not instructing or providing a verdict form concerning the jury finding appellant not guilty of the lesser included offense of murder for both count five and count six.

[8.] Appellant was deprived of the effective assistance of trial counsel in violation of appellant's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Section 10 and 16, Article I of the Ohio Constitution.

[9.] The trial court violated appellant's rights to due process and a fair trial when it entered a judgment of conviction based on insufficient evidence and against the manifest weight of the evidence in violation of appellant's rights under the Fifth and Fourteenth Amendments to the United States Constitution and Section 16, Article I of the Ohio Constitution.

{¶ 11} For analytical clarity, we address the assignments of error out of order.

A. Boone's First and Fifth Assignments of Error—Court Security Concerns

{¶ 12} Because these two assignments of error address the trial court's procedures to ensure the security of the courtroom, we will consider them together.

1. Shackles and Stun Belt

{¶ 13} At the beginning of trial, the trial court addressed the issue of courtroom security due to concerns raised by courtroom deputies. Specifically, the trial court noted that an unidentified witness told deputies that White and Boone had discussed "trying to hijack the courtroom." (Tr. 45.) Corporal Davis also described their disciplinary records while in custody, which included violent conduct that caused both White and Boone to be

placed in administrative segregation lockdown. Corporal Davis requested that White and Boone wear handcuffs, leg irons, and a belly chain while in the courtroom. The deputies used these restraints to secure the men when they were being moved. (Tr. 48.) Ultimately, the trial court ordered both White and Boone shackled together underneath the table so that the jury would not see the shackles. He also ordered Boone to wear a stun belt.² Boone's trial counsel objected to the use of the stun belt for health reasons. The trial court overruled the objection. The trial court did not require either White or Boone to wear handcuffs.

{¶ 14} During the trial, Boone's trial counsel requested that the trial court remove the stun belt from his client, citing health reasons and his client's good conduct during the trial. Trial counsel claimed that the stun belt made Boone uncomfortable and nervous which could have an effect on the jury. The trial court allowed the stun belt to be loosened but required that Boone continue to wear it during the trial. The trial court concluded that it was the least restrictive means available to keep the courtroom safe and also provide for a fair trial. (Tr. 534.)

{¶ 15} Boone now claims that the use of the shackles and stun belt violated his rights because there was inadequate justification for such restraints. He also argues that the trial court should have held a hearing to gather evidence to support the use of the security procedures. We disagree.

{¶ 16} The usual practice, of course, is for a defendant to appear in court free of shackles. *State v. Woodards*, 6 Ohio St.2d 14, 23 (1966). But it is widely accepted that a prisoner may be shackled in some circumstances. *State v. Cassano*, 96 Ohio St.3d 94, 2002-Ohio-3751, ¶ 54; *State v. Jackson*, 141 Ohio St.3d 171, 2014-Ohio-3707, ¶ 153 (noting circumstances). The Supreme Court of Ohio has also affirmed the use of stun belts in certain circumstances. *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, ¶ 105, 110. The decision to impose such restraints is left to the sound discretion of the trial court. *Cassano*, citing *State v. Richey*, 64 Ohio St.3d 353, 358 (1992). The trial court must exercise its own discretion and not leave the issue up to security personnel. *Adams* at ¶ 104.

² It is not clear from the record where the stun belt was placed on Boone's body or whether the jury could see it. Due to medical concerns, White did not wear a stun belt.

{¶ 17} Before ordering the restraint of a defendant, the Supreme Court of Ohio encourages trial courts to hold a hearing on the matter. *State v. Neyland*, 139 Ohio St.3d 353, 2014-Ohio-1914, ¶ 92. However, the court has never required a hearing. *Id.* at ¶ 94, citing *State v. Franklin*, 97 Ohio St.3d 1, 2002-Ohio-5304, ¶ 82. "Where the facts and circumstances surrounding a defendant illustrate a compelling need to impose exceptional security procedures, the trial court's exercise of discretion in this regard should not be disturbed unless its actions are not supported by the evidence before it." *Franklin* at ¶ 82. Therefore, there is no per se error because the trial court did not hold a hearing to address its security concerns.

{¶ 18} Here, even without a hearing, the trial court's reasons for imposing restraints are clear from the record. The trial court was informed of threats the defendants allegedly made about taking over the courtroom during the trial. A deputy also informed the trial court that the defendants had a poor behavioral record while in custody causing them to be placed in administrative segregation. Additionally, there appears to have been an incident between Boone and some spectators during which Boone exchanged words with a deputy and did not comply with the deputy's order. In light of the circumstances facing the trial court, we cannot say that it abused its discretion in requiring Boone to wear shackles and a stun belt. A trial court need not sit by helplessly waiting for a defendant to commit a violent or disruptive act in the courtroom before being cloaked with the power to invoke extra security measures. *Franklin* at ¶ 79, citing *Loux v. United States*, 389 F.2d 911, 919-20 (C.A.9, 1968).

{¶ 19} Additionally, the trial court exercised its own discretion in determining the least restrictive form of security procedures that would be most appropriate. While the deputy asked for additional steps, the trial court did not agree and refused to order Boone to wear handcuffs. Instead, the trial court ordered shackles and a stun belt and additional security procedures to deal with spectators. Thus, the trial court exercised its own discretion in this regard. *Jackson* at ¶ 158.

2. The "Closing" of the Courtroom

{¶ 20} The trial court also stated that an unnamed witness indicated that White and Boone planned to have the courtroom hijacked by outsiders. (Tr. 52.) As a result, the trial court ordered the courtroom deputies to address anyone who came into the

courtroom and, apparently, to run warrant checks to determine if anyone had outstanding arrest warrants. Those with warrants would be arrested. During the trial, Boone's trial counsel proffered that Boone's supporters were prohibited from coming in the courtroom if they were late and that they could not come and go as the state's witnesses could. Boone now complains that this amounted to a closure of the courtroom that violated his right to a public trial. We disagree.

{¶ 21} The right to a public trial is a fundamental constitutional guarantee under the Sixth Amendment to the United States Constitution and Ohio Constitution, Article I, Section 10. *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, ¶ 49-50, citing *State v. Lane*, 60 Ohio St.2d 112, 119 (1979). This guarantee is a "cornerstone of our democracy which should not be circumvented unless there are extreme overriding circumstances." *Id.*

{¶ 22} The trial court's actions in dealing with spectators did not amount to a closing of the courtroom for purposes of a public trial analysis. *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, ¶ 100-01. Although Boone claims that his supporters were not allowed in the courtroom, the record simply does not support his claim. The courtroom is not closed even though some spectators may choose not to enter because of fear they might be arrested on an outstanding warrant. Accordingly, because the trial court did not close the courtroom, the trial court did not violate Boone's right to a public trial.

{¶ 23} The trial court's procedures to ensure the safety and security of the courtroom and the people inside it were not an abuse of discretion. Accordingly, we overrule Boone's first and fifth assignment of error.

B. Boone's Third Assignment of Error- Severance of Trials

{¶ 24} Boone argues that the trial court erred by not severing his trial from White's trial. Again, we disagree.

{¶ 25} Crim.R. 8(D) provides that co-defendants may be tried together for a non-capital offense as long as they are alleged to have participated in the same act or transaction or in the same course of criminal conduct. *State v. Walters*, 10th Dist. No. 06AP-693, 2007-Ohio-5554, ¶ 21. As a general rule, the law favors joinder of trials because, among other reasons, it conserves judicial resources and reduces the possibility

of incongruous results before different juries. *Id.*; *State v. Miller*, 10th Dist. No. 11AP-899, 2013-Ohio-1242, ¶ 50. Nevertheless, a defendant may move for severance from a co-defendant's trial pursuant to Crim.R. 14 upon a showing of prejudice. *State v. Klinkner*, 10th Dist. No. 13AP-469, 2014-Ohio-2022, ¶ 18. The defendant has the burden to affirmatively demonstrate prejudice. *Id.*, citing *State v. Payne*, 10th Dist. No. 02AP-723, 2003-Ohio-4891, ¶ 23. The defendant must furnish the trial court with sufficient information so that it can weigh the considerations in favor of joinder against the defendant's right to a fair trial. *State v. Torres*, 66 Ohio St.2d 340, 343 (1981).

{¶ 26} The state may rebut a defendant's claim of prejudicial joinder in two ways. *State v. LaMar*, 95 Ohio St. 3d 181, 2002-Ohio-2128, ¶ 50. The first way is by satisfying the "other acts" test. *State v. Lott*, 51 Ohio St.3d 160, 163 (1990). If, in separate trials, the state could introduce evidence of the joined offenses as "other acts" under Evid.R. 404(B), a defendant cannot claim prejudice from the joinder. *Id.* See also, *State v. Coley*, 93 Ohio St.3d 253, 259-60 (2001). The state may also negate a claim of prejudice by satisfying the less stringent "joinder test," which requires a showing "that evidence of each crime joined at trial is simple and direct." *Lott* at 163; *State v. Torres*, 66 Ohio St.2d 340, 344 (1981).

{¶ 27} We typically review a trial court's decision on joinder of offenses for trial under an abuse of discretion standard. *State v. Banks*, 10th Dist. No. 09AP-1087, 2010-Ohio-5714, ¶ 30, citing *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, ¶ 49. Boone filed a motion for severance from White's trial prior to trial. Although the trial court never expressly ruled on Boone's motion, it implicitly denied it because it proceeded to try Boone and White together.

{¶ 28} Boone argued that he should be tried separately from White because the witnesses to the shooting quickly identified White as a shooter but did not identify Boone until well after the shooting. Boone claimed that this identification evidence against White potentially could have tainted his case. The danger of information being introduced against one of the co-defendants that may "spill over" against the other co-defendant is a risk present in every trial where defendants are tried jointly. *State v. Wyche*, 10th Dist. No. 87AP-878 (Feb. 21, 1989); *State v. Jewett*, 10th Dist. No. 11AP-1028, 2013-Ohio-1246, ¶ 46. There is no prejudice in such "spill over" situations, however, when the evidence of each crime as alleged against each defendant is simple and

distinct. *Id.* Here, the evidence against each defendant was simple and distinct. Witnesses identified White close in time to the shooting but did not identify Boone until weeks later. This is simple and easy and would allow the jury to separate the proof required as to each of the defendants. *Id.*

{¶ 29} Boone also made a vague reference to the admission of White's statements suggesting that the statements were prejudicial. However, Boone did not describe the substance of those statements or explain why the statements were prejudicial. In fact, White's testimony benefited Boone because White testified that Boone was not at the house at the time of the shooting.

{¶ 30} Boone has not demonstrated that the trial court abused its discretion when it did not sever Boone's trial from White's trial. Accordingly, we overrule his third assignment of error.

C. Boone's Second Assignment of Error—Trial Court Hostility Towards Counsel

{¶ 31} Boone argues that the trial court demonstrated bias and hostility towards his trial counsel by comments it made during trial counsel's cross-examination of Kibby. He argues that the comments led the jury to believe that the trial court believed Kibby, thus violating his due process rights. We disagree.

{¶ 32} We need not specifically address all of the trial court's comments. It is enough to say that Boone's trial counsel engaged in a difficult cross-examination of Kibby.³ Kibby was an antagonistic witness and either could not or would not understand several questions asked of him by counsel. Several times, Kibby asked the trial court whether he had to answer counsel's questions and once even scolded trial counsel for asking dumb questions. (Tr. 404.) While the trial court's comments were pointed, the trial court was trying to move the cross-examination along and to assist trial counsel in getting answers to his questions. We do not interpret the trial court's comments as lending credibility to Kibby's testimony. Nor are we persuaded that the comments were prejudicial to Boone. *State v. Miller*, 11th Dist. No. 2004-T-0082, 2005-Ohio-5283, ¶ 26-

³ The trial court commented that counsel was "not communicating well with [Kibby]." (Tr. 406.) In fact, at a side bar on this issue, the trial court told counsel that "[y]ou have a witness up here who doesn't want to be here, and I'm trying to make him as comfortable as possible." (Tr. 413.)

29 (no demonstration that trial court's comments were prejudicial). Accordingly, we overrule Boone's second assignment of error.

D. Boone's Fourth Assignment of Error—The Admission of Other Acts Testimony

{¶ 33} Boone argues that the trial court erred by allowing a detective to describe how he identified Boone as a possible suspect and why he placed Boone's photo in a photo array. Specifically, the detective testified that he "developed [Boone] as a suspect due to some information I received on an unrelated incident where a young female had been beaten up." (Tr. 782.) Trial counsel objected and requested that the detective not testify any further about the unrelated incident. During a sidebar on the issue, the trial court specifically instructed the prosecutor to leave the testimony as it was and even told the prosecutor that "the next question should be, based upon that development, did you create the photo array" so the prosecutor would avoid any more questions about the incident and move on from that fact. (Tr. 786-87.) The prosecutor complied and there was no further discussion about the unrelated incident.

{¶ 34} Boone argues that the admission of the detective's testimony violated Evid.R. 404(B), which prohibits evidence of other acts to prove the character of a person in order to show action in conformity but allows it for other purposes. We are unpersuaded by Boone's argument.

{¶ 35} First, we note that trial counsel did not object to the testimony on these grounds and has, therefore, forfeited the error absent plain error. *State v. Tibbetts*, 92 Ohio St.3d 146, 160-61 (2001). Under Crim.R. 52(B), plain errors affecting substantial rights may be noticed by an appellate court even though they were not brought to the attention of the trial court. To constitute plain error, there must be: (1) an error, i.e., a deviation from a legal rule, (2) that is plain or obvious, and (3) that affected substantial rights, i.e., affected the outcome of the trial. *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002). Even if an error satisfies these prongs, appellate courts are not required to correct the error. Appellate courts retain discretion to correct plain errors. *Id.*; *State v. Litreal*, 170 Ohio App.3d 670, 2006-Ohio-5416, ¶ 12 (10th Dist.). Courts are to notice plain error under Crim .R. 52(B) " 'with the utmost caution, under exceptional circumstances and

only to prevent a manifest miscarriage of justice.' " *Barnes*, quoting *State v. Long*, 53 Ohio St.2d 91 (1978), paragraph three of syllabus.

{¶ 36} Second, the testimony in question does not clearly fall under Evid.R. 404(B) because it did not specifically identify Boone as the woman's attacker, although it could have left the jury with that impression. Nevertheless, because Boone was not specifically identified as the attacker, we conclude it does not constitute plain error. Accordingly, we overrule Boone's fourth assignment of error.

E. Boone's Sixth and Seventh Assignments of Error—Jury Instructions and Verdict Forms

{¶ 37} Because these two assignments of error are related, we address them together.

1. The Causation Instruction

{¶ 38} In his sixth assignment of error, Boone contends that the trial court erred in instructing the jury on the causation element of the aggravated murder counts. We disagree.

{¶ 39} In order to find Boone guilty of aggravated murder or murder, the state had to prove, in part, that he purposely caused the death of another. The trial court instructed the jury that "[c]ause is an act which in the natural and continuous sequence directly produces the death and without which it would not have occurred. Cause occurs when the death is the natural and foreseeable result of the act." (Tr. 899.) The Supreme Court of Ohio, in *State v. Burchfield*, 66 Ohio St.3d 261, 263 (1993), noted its concern with the use of this causation instruction. It stated that the usefulness of the instruction in murder cases was questionable and that it "should be given most cautiously in future murder cases." *Id.* However, in subsequent cases, the court has also determined that the provision of this causation instruction, if not objected to, is subject to plain error review. *State v. Getsy*, 84 Ohio St.3d 180, 196 (1998). Boone's trial counsel did not object to the causation definition and has, therefore, forfeited all but plain error.

{¶ 40} The trial court's use of the causation instruction does not require reversal where the instructions as a whole make it clear that the jury must find purpose to kill in order to convict. *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396, ¶ 105, citing *State v. Phillips*, 74 Ohio St.3d 72, 100 (1995). Here, the trial court extensively instructed

the jury on the requirement of purpose and intent prior to the causation language. (Tr. 1009.) *Williams*, citing *State v. Goodwin*, 84 Ohio St.3d 331, 346 (1999). Thus, the causation instruction was not plain error because it was made clear to the jury that it was required to find purpose to kill in order to convict. *Goodwin* at 346; *State v. Sapp*, 105 Ohio St.3d 104, 2004-Ohio-7008, ¶ 98.

2. The Aggravated Murder and Murder Verdict Forms

{¶ 41} Boone contends in his seventh assignment of error that the verdict forms were not sufficient for the prior calculation and design counts of aggravated murder because they did not include a form that would have allowed the jury to find him not guilty of both aggravated murder and the lesser-included offense of murder. Trial counsel did not request such a verdict form and has, therefore, forfeited the error absent plain error. *State v. Thompson*, 2d Dist. No. 22984, 2010-Ohio-1680, ¶ 155-95 (applying plain error analysis to similar claim).

{¶ 42} Aggravated murder, as indicted in this case, requires the state to prove that Boone purposely, and with prior calculation and design, caused the death of another. Murder in this case is a lesser-included offense of aggravated murder. The sole difference is that prior calculation and design is absent from murder.⁴ *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, ¶ 136; *State v. Monroe*, 105 Ohio St.3d 384, 2005-Ohio-2282, ¶ 36.

{¶ 43} In regards to these two counts of aggravated murder, the trial court instructed the jury that if they found that the state failed to prove the prior calculation and design element of aggravated murder, they had to find Boone not guilty of aggravated murder but must then consider the lesser included offense of murder. The trial court did not specifically instruct the jury that it could find him not guilty of murder. It did, however, instruct the jury that if it found that the state failed to prove any element of an offense, it must return a not guilty verdict on the offense. (Tr. 990.)

{¶ 44} The verdict forms presented for these two counts of aggravated murder allowed the jury to find Boone: (1) guilty of aggravated murder, (2) not guilty of aggravated murder, or (3) not guilty of aggravated murder but guilty of murder. Boone

⁴ R.C. 2903.02(A) ("No person shall purposely cause the death of another.").

contends that the trial court should have included a fourth form that would have allowed the jury to find him not guilty of both aggravated murder and murder.

{¶ 45} There would be only one way for the jury to have considered the lesser-included offense of murder in this case: if it found that the state had not proven the "prior calculation and design" element of aggravated murder. In that instance, the jury would then consider whether the state had proved the elements of murder. The third verdict form would be proper if the jury then concluded that the state proved the elements of murder beyond a reasonable doubt. If, however, the jury concluded that the state failed to prove the elements of murder beyond a reasonable doubt, then the second verdict form would be proper. Although the verdict form that Boone now argues should have been provided to the jury might have made this more clear, the failure to provide such a form is not fatal.

{¶ 46} Even if the verdict forms could have been more clear, the trial court clarified the issue after the jury returned its verdict when it asked the foreperson if the jury intended to find Boone not guilty of aggravated murder but guilty of murder on these counts. The foreperson affirmed that was their intention. The trial court then explained to Boone's counsel that the forms that went back to the jury did not include a form that would have allowed the jury to find him not guilty of both aggravated murder and murder (the exact form Boone now argues should have been provided). Trial counsel stated that they were "satisfied with the jury's presentation and their responses in the courtroom." (Tr. 1060.) Under these circumstances, we cannot say that the failure to include the fourth verdict form constituted plain error because it is clear that the jury intended to find Boone guilty of murder.

{¶ 47} Having found no plain error in the trial court's use of the causation instruction or the verdict forms, we overrule Boone's sixth and seventh assignments of error.

F. Boone's Ninth Assignment of Error—Sufficiency and Manifest Weight of the Evidence

{¶ 48} In his ninth assignment of error, appellant contends that his convictions are not supported by sufficient evidence and are also against the manifest weight of the evidence. Although sufficiency and manifest weight are different legal concepts, manifest

weight may subsume sufficiency in conducting the analysis; that is, a finding that a conviction is supported by the manifest weight of the evidence necessarily includes a finding of sufficiency. *State v. McCrary*, 10th Dist. No. 10AP-881, 2011-Ohio-3161, ¶ 11, citing *State v. Braxton*, 10th Dist. No. 04AP-725, 2005-Ohio-2198, ¶ 15. "[T]hus, a determination that a conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency." *Id.* In that regard, we first examine whether appellant's convictions are supported by the manifest weight of the evidence. *State v. Gravely*, 188 Ohio App.3d 825, 2010-Ohio-3379, ¶ 46 (10th Dist.).

{¶ 49} The weight of the evidence concerns the inclination of the greater amount of credible evidence offered to support one side of the issue rather than the other. *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997). When presented with a challenge to the manifest weight of the evidence, an appellate court may not merely substitute its view for that of the trier of fact, but must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *Id.* at 387. An appellate court should reserve reversal of a conviction as being against the manifest weight of the evidence for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Id.*, quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983); *State v. Strider-Williams*, 10th Dist. No. 10AP-334, 2010-Ohio-6179, ¶ 12.

{¶ 50} In addressing a manifest weight of the evidence argument, we are able to consider the credibility of the witnesses. *State v. Cattledge*, 10th Dist. No. 10AP-105, 2010-Ohio-4953, ¶ 6. However, in conducting our review, we are guided by the presumption that the jury, or the trial court in a bench trial, " 'is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.' " *Id.*, quoting *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80 (1984). Accordingly, we afford great deference to the jury's determination of witness credibility. *State v. Redman*, 10th Dist. No. 10AP-654, 2011-Ohio-1894, ¶ 26, citing *State v. Jennings*, 10th Dist. No. 09AP-70, 2009-Ohio-

6840, ¶ 55. *See also State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus (credibility determinations are primarily for the trier of fact).

{¶ 51} Boone first attacks the credibility of the state's witnesses who testified that they were in the house with White during the shooting. He notes that Kibby's and Williams' testimony differed in some details. However, a defendant is not entitled to a reversal on manifest weight grounds merely because inconsistent evidence was presented at trial. *State v. Neff*, 10th Dist. No. 09AP-360, 2009-Ohio-6846, ¶ 18. The jury was in the best position to assess the credibility of these witnesses and chose to believe their testimony. That is a decision within the province of the jury. *State v. Woodward*, 10th Dist. No. 03AP-398, 2004-Ohio-4418, ¶ 20. Their testimony was not so incredible as to render Boone's convictions against the manifest weight of the evidence. *State v. Thompson*, 10th Dist. No. 07AP-491, 2008-Ohio-2017, ¶ 34.

{¶ 52} Boone also points out the lack of physical evidence linking him to the crime scene and other testimony that he was not present when the murders occurred.

{¶ 53} The lack of physical evidence linking Boone to these crimes does not render his convictions against the manifest weight of the evidence. *State v. Berry*, 10th Dist. No. 10AP-1187, 2011-Ohio-6452, ¶ 20, citing *State v. Nix*, 1st Dist. No. C-030696, 2004-Ohio-5502, ¶ 65-71 (rejecting argument that convictions were against the manifest weight of the evidence where testimony overwhelmingly supported convictions). While physical evidence would have strengthened the case, the testimony of Kibby, Williams, and Harris strongly linked Boone to these crimes. Given this testimony, we cannot say the jury lost its way and created a manifest miscarriage of justice. *Id.*, citing *State v. Jackson*, 7th Dist. No. 09 JE 13, 2009-Ohio-6407, ¶ 13-16 (lack of physical evidence does not make convictions against manifest weight of the evidence where victim's testimony linked defendant to crimes); *State v. Reine*, 4th Dist. No. 06CA3102, 2007-Ohio-7221, ¶ 25 (same).

{¶ 54} Additionally, a conviction is not against the manifest weight of the evidence because the trier of fact believed the state's version of events over Boone's version. *State v. Scott*, 10th Dist. No. 10AP-174, 2010-Ohio-5869, ¶ 16. The jury chose to believe the testimony of the state's witnesses and reject the testimony indicating that Boone was not present when the crimes occurred. This was within the province of the jury as the trier of

fact, and we will not substitute our judgment for that of the trier of fact. *Id.* at ¶ 17, citing *State v. Jackson*, 10th Dist. No. 06AP-1267, 2008-Ohio-1277, ¶ 15.

{¶ 55} Given the conflicting evidence presented at trial, this is not the exceptional case in which the evidence weighs heavily against the conviction. Accordingly, Boone's convictions are not against the manifest weight of the evidence. That conclusion is also dispositive of his claim that the convictions are not supported by sufficient evidence. *Gravely*. Accordingly, we overrule Boone's ninth assignment of error.

G. Boone's Eighth Assignment of Error—Ineffective Assistance of Counsel

{¶ 56} Lastly, Boone contends in his eighth assignment of error that he received ineffective assistance of trial counsel. Again, we disagree.

{¶ 57} To establish a claim of ineffective assistance of counsel, appellant must show that counsel's performance was deficient and that counsel's deficient performance prejudiced him. *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, ¶ 133, citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The failure to make either showing defeats a claim of ineffective assistance of counsel. *State v. Bradley*, 42 Ohio St.3d 136, 143 (1989), quoting *Strickland* at 697. ("[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one.").

{¶ 58} In order to show counsel's performance was deficient, the appellant must prove that counsel's performance fell below an objective standard of reasonable representation. *Jackson* at ¶ 133. The appellant must overcome the strong presumption that defense counsel's conduct falls within a wide range of reasonable professional assistance. *Strickland* at 689. To show prejudice, the appellant must establish that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, ¶ 204.

{¶ 59} For the most part, this assignment of error consists of Boone's claims that trial counsel was deficient for failing to object to the previously assigned errors.

{¶ 60} Specifically, Boone first argues that trial counsel acted deficiently by not requesting a hearing on the use of the shackles and stun belt. Even if the trial court

should have held a hearing, Boone fails to point to any facts that suggest the information received by the trial court informally would have been any different had the trial court held a hearing. Therefore, there is nothing in the record that indicates the trial court would not have imposed the restraints if it had held a hearing. Thus, Boone has not demonstrated any prejudice.

{¶ 61} On a similar note, Boone argues that trial counsel should have made a record of the noises that the shackles made during the trial. As a result of this failure, however, there is no support in the record for the claim that the shackles made any noise. Accordingly, based on the evidence in the record, we cannot conclude that trial counsel was deficient for not making this point on the record. A claim of ineffective assistance of counsel which relies on evidence outside the record should be raised in a petition for post-conviction relief. *State v. Cooperrider*, 4 Ohio St.3d 226, 228 (1983).

{¶ 62} Boone also argues that trial counsel's failure to request a hearing on or otherwise object to the trial court's "closure" of the courtroom constituted ineffective assistance of counsel. Because we have already concluded that the trial court did not close the courtroom, we reject this argument.

{¶ 63} Boone also points out trial counsel's failure to object to the causation instruction detailed in his sixth assignment of error. Boone cannot demonstrate prejudice because the instructions provided to the jury, when read as a whole, make it clear that the jury had to find purpose to kill beyond a reasonable doubt in order to convict Boone. *State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, ¶ 220 (rejecting same claim of ineffective assistance of counsel). Therefore, Boone has failed to demonstrate a reasonable probability that but for this alleged ineffective assistance, the result would have been different.

{¶ 64} Boone also argues that his trial counsel was ineffective for not requesting a verdict form that would have allowed the jury to find him not guilty of murder. Again, Boone cannot establish prejudice in this regard because the trial court asked the jury if their intent, regardless of the forms, was to find him not guilty of aggravated murder and guilty of murder. The jury replied that that was their intent. Thus, even with the fourth verdict form that Boone argues should have been provided, the result of the proceeding would not have been different.

{¶ 65} Boone does present two new arguments in this assignment of error. He first argues that his trial counsel was ineffective for asking a question during cross-examination that suggested Boone may have fired a gun during the shooting. Specifically, trial counsel asked Kibby if he "originally told the detectives that both men had guns and were shooting?" (Tr. 401.) No witness had testified that Boone fired a gun before this question.

{¶ 66} The scope of cross-examination clearly falls within trial strategy, and debatable trial tactics do not establish ineffective assistance of counsel. *State v. Campbell*, 90 Ohio St.3d 320, 339 (2000); *State v. Otte*, 74 Ohio St.3d 555, 565 (1996). Kibby testified that Boone was in the house when the murders occurred, but did not shoot a gun. Trial counsel's decision to impeach Kibby during cross-examination with a prior inconsistent statement, albeit one that arguably implicated his client, is a strategic decision. Tactical or strategic trial decisions, even if ultimately unsuccessful, do not generally constitute ineffective assistance. *State v. Carter*, 72 Ohio St.3d 545, 558 (1995) ("Judicial scrutiny of counsel's performance is to be highly deferential, and reviewing courts must refrain from second-guessing the strategic decisions of trial counsel.").

{¶ 67} Second, Boone argues that trial counsel was deficient for failing to object to testimony indicating that he had been in jail. Specifically, Terrill White testified that he learned Boone had been picked up on these charges "[w]hen he was in custody." (Tr. 844.) Although the trial court overruled counsel's objection to that comment, trial counsel did not object to two additional questions from the prosecutor in which White was asked about Boone being in jail. Boone claims that this evidence deprived him of his presumption of innocence. Even if trial counsel was deficient when he failed to object to these questions, we cannot conclude that the result of the trial would have been different if this evidence had not been admitted.

{¶ 68} Lastly, Boone contends that the cumulative effect of his counsel's errors deprived him of a fair trial. We disagree. Even considering the alleged deficiencies of Boone's trial counsel together, we do not conclude there is a reasonable probability that, but for these deficiencies, the result would have been different. Accordingly, we overrule his eighth assignment of error.

III. Conclusion

{¶ 69} Having overruled all of Boone's assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN, P.J., and TYACK, J., concur.
