[Cite as *State v. Jones*, 2011-Ohio-2097.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-05-140
	:	O P I N I O N
- vs -		5/2/2011
	:	
KOBE J. JONES,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2008-12-2236

Michael T. Gmoser, Butler County Prosecuting Attorney, Donald R. Caster, Government Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45011, for plaintiff-appellee

Scott N. Blauvelt, Jones & Baden Building, 246 High Street, Hamilton, Ohio 45011, for defendant-appellant

HENDRICKSON, P.J.

{¶1} Defendant-appellant, Kobe Jones, appeals his convictions in the Butler County Court of Common Pleas for single counts of burglary, robbery, and obstructing official business. We affirm the convictions.

{¶2} At approximately 12:30 a.m. on December 14, 2008, Aaron Putnam returned home from work, parked in the driveway of his parents' home, opened the large garage door, left it opened, and entered his home through the smaller door in the

garage that led into the house. After changing clothes in his upstairs bedroom, Putnam returned downstairs and opened the door leading from the house to the attached garage. Upon opening the door, Putnam noticed that the motion light in the garage was lit and then saw a man, later identified as Jones, sitting in his stepmother's car. Once Jones saw Putnam at the door, he threw down a purple Crown Royal bag full of change he had taken from the car, and began running from the garage.

{¶3} Putnam testified at trial that once he encountered Jones in his garage, he began pursuing Jones after his "adrenaline kicked in," because he was "fed up" with prior break-ins, and that he "wasn't going to let this happen again." During the foot chase, Putnam saw Jones throw down something shiny, but did not stop his pursuit to see what item Jones had discarded. Putnam also testified that at one point during the chase, he stopped to catch his breath, and lost sight of Jones for a "second," but then saw that Jones had fallen down a small hill in a neighbor's yard. When Putnam caught up with Jones, he was trying to get up, but could not. Putnam testified that he knew that Jones was the same man from his parents' car because he was wearing the same red hooded sweatshirt and jeans the man from the car had on when Putnam first encountered him.

{¶4} Putnam testified that when he reached the hill, he jumped on top of Jones, and Jones tried to kick him in the face a few times. At that point, Putnam "kind of just put my hands around his legs, and pushed him to the side." The two tussled as Jones was trying to escape, and Putnam testified that Jones ripped his shirt, and threw his arms around trying to get Putnam off of him. At that time, Putnam punched Jones a "couple of times" and Jones rolled over onto his stomach. Putnam then called 911, reported the incident, and continued to sit on Jones until the police arrived. Putnam testified that after police arrived, he gave them his statement, and the officers arrested

Jones.

{¶5} On cross-examination Putnam was questioned regarding his ability to identify Jones as the perpetrator, and Putnam testified that he told the prosecutors that he was unable to identify Jones from the night of the incident, but rather from seeing him at the preliminary hearing. Putnam further testified that "it was dark out and I didn't know who it was. I didn't see his face. I didn't know who he was."

{¶6} Officer Dave Pratt, with the Fairfield Township Police Department, testified that he responded to Putnam's 911 call, and investigated the scene further. Pratt testified that he entered the Crown Royal bag into evidence, and also searched for the shiny object Putnam had seen Jones throw. Putnam traced the chase route and found a flashlight in the direct path from where Jones ran from the garage to where he was later apprehended.

{¶7} Officer Cory Stebbins with the Fairfield Township Police Department testified that he arrived on the scene and took Jones into custody. Stebbins stated that he advised Jones of his *Miranda* rights, and asked him if he would waive his rights and answer questions. Stebbins asked Jones his name, and Jones responded, "Eric Tolliver." Stebbins patted Jones down, and located a wallet in his pocket. When Stebbins opened the wallet, he found several forms of identification, including a social security card and birth certificate, with the name Kobe Jones on it. When Stebbins asked Jones to identify Kobe Jones, Jones replied, "that's my cousin." Stebbins also found two gift cards and two credit cards in the wallet that did not belong to Jones.

{¶8} After arresting Jones, Stebbins ran the information found on the social security card and birth certificate which were found in Jones' wallet, and determined that Jones had an outstanding warrant. At the police station, officers pulled Jones' photograph from the Attorney General website, and verified that the photograph

matched Jones, rather than the name Eric Tolliver that Jones had first used. During that time, Jones' phone indicated an incoming text message, and Stebbins testified that the message was a warning to Jones telling him that police were in the area and to "be careful."

{¶9} Stebbins also testified that the day after the incident, he was called to the same area where Putnam lived, based on a call of a suspicious vehicle. When Stebbins ran the plates of the suspicious vehicle, he learned that the car belonged to a Delores Pynckel, who was a roommate of Jones.

{¶10} Detective John Vanderyt of the Fairfield Township Police Department testified that he was involved in the investigation regarding Jones and Pynckel's car in relation to over 50 automobile break-ins during the summer and fall of 2008 in the area of Putnam's home. During the investigation, Vanderyt read Jones his *Miranda* rights, and Jones waived them after he was given a written copy of the warnings, initialed each line of the warnings, and signed at the bottom of the form.

{¶11} Vanderyt testified that after Jones waived his *Miranda* rights, he spoke to Vanderyt about performing the car break-ins along with two other men and receiving stolen credit cards in return for his participation. Jones also told Vanderyt that he entered Putnam's garage through the open door, opened the door to the car, took the Royal Crown bag full of change, and threw the bag down once Putnam opened the door from the house and saw him.

{¶12} Jones was indicted on two counts of receiving stolen property and single counts of burglary, robbery, and obstructing official business. Before the trial began, Jones pled no contest to the two counts of receiving stolen property and was found guilty by the trial court and sentenced to two years. The jury convicted Jones of single counts of burglary, robbery, and obstructing official business, and the trial court

sentenced Jones to a total of six years, consecutive to the sentence for receiving stolen property.

{¶13} Jones filed an appeal with this court, which was dismissed after Jones failed to file an appellate brief. However, this court granted Jones' application for reopening of his appeal, and now considers the assignments of error asserted.

{¶14} Assignment of Error No. 1:

{¶15} "APPELLANT KOBE JONES WAS DENIED THE RIGHT TO DUE PROCESS AND A FAIR TRIAL, IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION, PURSUANT TO A PERVASIVE PATTERN OF PREJUDICIAL PROSECUTORIAL MISCONDUCT WHICH INFECTED THE ENTIRE TRIAL."

{¶16} In his first assignment of error, Jones argues that the prosecution engaged in repeated acts of misconduct throughout the trial, denying him the right to a fair trial. This argument lacks merit.

{¶17} "The test for prosecutorial misconduct is whether remarks were improper and, if so, whether they prejudicially affected substantial rights of the accused. The touchstone of analysis 'is the fairness of the trial, not the culpability of the prosecutor.'" *State v. Cornwell*, 86 Ohio St.3d 560, 570, 1999-Ohio-125, quoting *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S.Ct. 940, 947. However, "not every intemperate remark by counsel can be a basis for reversal." *State v. Landrum* (1990), 53 Ohio St.3d 107, 112.

{¶18} Jones asserts several instances of prosecutorial misconduct throughout the course of his trial. These instances can be grouped into two separate categories: evidence introduced at trial over Jones' objections, and statements made during the

state's closing argument and rebuttal.

{¶19} Regarding the evidence admitted into evidence, we note that Jones does not challenge the trial court's decision to admit the evidence, but rather claims that the prosecution improperly examined its witnesses. Jones first argues that the prosecutor improperly elicited identification testimony from Putnam regarding whether Jones was the man he saw in his stepmother's car on the night of the robbery. However, Putnam's testimony regarding his ability to identify Jones goes to his credibility as a witness, rather than constituting improperly-elicited testimony by the state. Jones also extensively cross-examined Putnam regarding the point at which Putnam was able to positively identify him, and used Putnam's testimony as a major component of its defense that Putnam incorrectly identified him as the perpetrator.

{¶20} Jones also argues that the prosecutor's questions to Officer Stebbins regarding stolen credit cards and the open arrest warrant were improper. During its direct examination of Officer Stebbins, the state asked about the stolen credit cards found in Jones' possession on the night of his arrest, and the subsequent discovery of an open arrest warrant on an unrelated matter. However, these issues were relevant to the obstruction of justice charge against Jones. Stebbins testified that after Jones identified himself as Eric Tolliver, Stebbins found a social security card and birth certificate with Jones' name on it, as well as several credit cards with various names in Jones' wallet. Stebbins also testified that he ran the information from the social security card and birth certificate and discovered that there was an open warrant for Jones, and stated that "that was the reason we were trying to identify the difference between Eric Tolliver and Kobe Jones." The state properly elicited this testimony to demonstrate that Jones gave the officers false information during their investigation, and the testimony did not constitute prosecutorial misconduct.

{¶21} Jones next argues that the prosecutor improperly elicited testimony regarding the incoming text message. While Jones objected to the text message as inadmissible hearsay, the trial court properly overruled the objection. According to Stebbins' testimony, Jones' phone indicated an incoming text message warning Jones that police were in the area that night and to be careful. However, the contents of the text message were not being offered to prove that police, were in fact, in the area that night, but rather to describe what Stebbins observed the night of the arrest. At Jones' behest, the trial court explained the difference to the jury, and instructed that the jury could not use the text message to establish the truth of the matter asserted. This exchange was not improper and did not constitute misconduct.

{¶22} Jones also asserts that the state improperly introduced evidence regarding Jones' prior conviction for receiving stolen property. While we agree with Jones that the testimony should not have been admitted in the manner in which it was, the admission does not rise to the level of reversible error. During Jones' cross-examination of Officer Pratt, the following exchange occurred:

{¶23} "[Q.]: * * * but the point about the garage, Kobe told you 'I wasn't in that garage'?

{¶24} "[A.]: That's what he said.

{¶25} "[Q.]: He told you that more than once?

{¶26} "[A.]: Yes.

{¶27} "[Q.]: Okay. Now, the – and that would be because you know, you asked him more than once?

{¶28} "[A.]: Correct.

{¶29} "[Q.]: And you even told him they would go easier on him if he just admitted it, correct?

{¶30} "[A.]: No.

{¶31} "[Q.]: Well, why did you keep asking him if he kept denying it?

{¶32} "[A.]: Because I had an eye witness that said he was in the garage."

{¶33} Later in the cross-examination, defense counsel posed another question to Pratt regarding why the police did not take fingerprints, and stated "I mean, you've got an alleged victim saying I saw somebody in my garage. You've got Kobe Jones saying I wasn't that somebody in your garage." After the cross-examination ended, the state asked the trial court for a bench conference, during which it announced its intent to re-examine Pratt about Jones' prior criminal record. The state argued that defense counsel placed Jones' credibility in issue by introducing exculpatory statements through cross-examination questions. The following exchange then occurred:

{¶34} "[TRIAL COURT]: You solicit it. You're trying to put your client's veracity at issue by asking the witness.

{¶35} "[DEFENSE COUNSEL]: Asking what?

{¶36} "[TRIAL COURT]: About an exculpatory statement.

{¶37} "[DEFENSE COUNSEL]: That doesn't open the door to get into that.

{¶38} "[TRIAL COURT]: Sure it does.

{¶39} "* * *

{¶40} "[DEFENSE COUNSEL]: That's the first I ever heard about that. They are not allowed to get in * * * or risk hearing about a criminal record.

{¶41} "[TRIAL COURT]: You're the one that elicited an exculpatory statement."

{¶42} The trial court permitted the state to question Pratt about Jones' previous criminal record for receiving stolen property, and permitted the state to enter judgment entries journalizing the convictions. According to Evid.R. 609(A), "for the purpose of attacking the credibility of *a witness*," a party can introduce evidence that the witness

has been convicted of a crime so long as "the crime involved dishonesty or false statement." Evid.R. 609(A)(3). (Emphasis added.) However, the rule applies only to witnesses who actually testify at trial. See *State v. Washington*, Cuyahoga App. No. 79300, 2002-Ohio-505, 2002 WL 192086, *3, (finding that state could not introduce evidence of appellant's criminal record through the testimony of a police officer because "pursuant to Evid.R. 609(A), evidence concerning previous criminal convictions is only admissible to attack the credibility of a witness. Washington did not testify at trial, and, therefore, evidence of his prior criminal record is inadmissible").

{¶43} Although the trial court erred in permitting Pratt to discuss Jones' prior criminal convictions for receiving stolen property, the trial court's error does not impute to the prosecution or constitute misconduct in any way. The trial court should have ruled properly on Jones' objection, but the error does not change the nature of the prosecution's attempt to introduce Jones' criminal record into improper conduct.

{¶44} Although the trial court should not have permitted the state to impeach Jones' credibility, the error was harmless. "While an accused has a constitutional right to a trial free from prejudicial error, that does not necessarily mean that a trial will be free from all error." *State v. Sims*, Butler App.No. CA2007-11-300, 2009-Ohio-550, ¶34. Even where a trial court errs by admitting inadmissible testimony, "the error is harmless so long as the error did not contribute to appellant's conviction." Id. Thus, harmless error is appropriate where there is "overwhelming evidence or guilt" or "some other indicia that the error did not contribute to the conviction." *State v. Ferguson* (1983), 5 Ohio St.3d 160, 166, fn. 5.

{¶45} The trial court's error was harmless because Pratt's testimony did not contribute to Jones' conviction. The trial court gave the jury a limiting instruction regarding the testimony and expressly stated that Pratt's testimony could not be used to

demonstrate that Jones "acted in conformity with the prior conviction," and that the jury could not use the testimony for any reason other than determining Jones' credibility regarding the statements to officers regarding his presence in the garage.

{¶46} Also, there was overwhelming evidence of Jones' guilt, regardless of Pratt's testimony. The jury heard testimony from Putnam that he found Jones in his step-mother's car, he chased Jones until he caught him, and subdued Jones until officers arrested him. The jury also heard testimony regarding Jones' confession to Detective Vanderyt that he entered Putnam's garage through the open door, opened the door to the car, took the Royal Crown bag full of change, and threw the bag down once Putnam opened the door from the house and saw him.

{¶47} Jones also challenges several of the state's comments during the prosecution's closing argument and rebuttal. "In examining the prosecutor's arguments for possible misconduct, we must review the argument as a whole, not in isolated parts, and we must examine the argument in relation to that of opposing counsel." *State v. Wilson*, Clermont App. No. CA2001-09-072, 2002-Ohio-4709, ¶61.

{¶48} Jones first argues that the prosecution misstated the law regarding the elements of burglary when the state defined stealth as "any secret or sly act to gain entrance. Entering an open garage during the cover of night --." Jones objected to the state's definition before it could finish its statement, and argued at a bench conference that the state should not be permitted to argue that entering a garage under cover of night constitutes stealth. The trial court noted that the state was free to argue that entering a garage at night is stealth and that arguments are different than legal standards. The trial court stated, "I tell the jury the law. I've made that very clear. * * * I'm going to tell them stealth is defined, and I give them the definition out of the Ohio Jury Instructions of what stealth is." The court then told the prosecutor to focus on the

argument, but not to tell the jury the law regarding stealth. After the bench conference concluded, the prosecutor changed the subject, and discussed the element of trespass.

{¶49} Read in context with the rest of the argument and what the jury had been told regarding the law, the prosecution's statement did not prejudice Jones. Before closing arguments began, the trial court specifically told the jury that it was to rely on the court's definitions, rather than any statements from the parties. "It is the obligation of the Court to tell you what the law is. The instructions of law comes [sic] from the Court. Now, the attorneys are given an opportunity to argue the law as it applies to the facts. I give you the law. So please, if the law differs from what the attorneys say, again, you are to rely upon the Court's instructions of law * * *." The court also reminded the jury that it would receive jury instructions and that because of the instructions, "you will know exactly what the law is."

{¶50} The jury instructions defined stealth as "any secret or sly act to gain entrance." Jones did not object to the definition within the instructions, the same definition given during the state's closing argument. Jones' argument, therefore, seems to suggest that the state was defining stealth by stating that "entering an open garage during the cover of night" constituted stealth. However, this was the state's argument, applying the facts of the case to the legal standard, rather than an attempt to define the element itself. Therefore, the statement was not improper.

{¶51} Jones next argues that the prosecutor misstated important facts based on the testimony and evidence offered at trial. First, the prosecution made references to Officer Stebbins' investigation into the incident and the report of a suspicious car in the same area as Putnam's home the day after Jones' arrest. According to Stebbins' testimony, he investigated a call reporting that a suspicious car had been parked in the

area, and when he ran the plates, he discovered that the car belonged to Jones' roommate, Delores Pynckel. During closing, the prosecution stated, "Ladies and gentlemen, you also heard testimony from Officer Stebbins that he was dispatched to the very same area of Walden Ponds a few hours after he booked the defendant, and why was that? It was because he responded to a suspicious vehicle that was reported stolen by a Delores Pynckel."

{¶52} Jones immediately objected, and stated, "that wasn't his testimony." The trial court specifically stated, "the jury's just going to have to rely upon your collective memory during deliberations to decide if that was the testimony of a witness or not. I've already given that instruction." The court, had in fact, explained to the jury before closing arguments began that "statements of attorneys are not evidence. In deciding this case as far as the evidence, you should rely on the testimony and exhibits submitted into evidence. So, if your recollection is different than the attorney's recollections of the facts in this case, I would ask you to rely upon your collective memory during deliberation."

{¶53} In addition to the trial court's specific instruction to the jury to rely on its memory of the facts, the car was not an issue in the case. Jones now claims that the prosecution's statement somehow imputed that he had stolen the car. However, the jury was instructed to rely upon Stebbins' actual testimony, which did not imply that Jones stole the car.

{¶54} Jones next argues that the prosecution misquoted a section of the 911 recording, and by doing so, implied that Putnam suffered head injuries as a result of the struggle with Jones. During closing and rebuttal, the state referenced the 911 recording and incorrectly quoted Putnam as saying "Man, you f-ed up my head too," and "you just f-ed up my head too, kid." During the 911 call, Putnam can be heard stating that Jones

"f**ked up my night," and that Jones "f**ked up" by trying to steal from him. However, at no point during the 911 call did Putnam claim that Jones injured his head.

{¶55} While the state misstated the facts regarding the 911 call, the jury had already been told that it was to rely on its own memory when considering the evidence. Also, because the recording was entered into evidence, any factual mistakes would be cured once the jury listened to the recording as part of its deliberations.

{¶56} Although we have found that the prosecutor's statements containing factual errors did not prejudicially affect Jones' substantial rights or result in an unfair trial, we nonetheless strongly caution the prosecution to proceed with greater care of the facts. The state's comments were made regarding evidence that it submitted during its case in chief, and it is reasonable to expect a competent prosecutor to know its evidence well enough not to engage in the blatant factual mistakes that occurred during closing. However, because the jury was instructed to determine from their own memory the factual distinctions, and had the 911 recording to correct the misstatements of fact, we cannot say that Jones was denied a fair trial as a result of the prosecution's carless recitation of the facts.

{¶57} Jones also argues that the state improperly vouched for the credibility of its witnesses when the prosecutor told the jury that the officers and Putnam were telling the truth during their testimony. "It is improper for an attorney to express a personal belief or opinion as to the credibility of a witness. * * * In order to vouch for the witness, the prosecutor must imply knowledge of facts outside the record or place the prosecutor's personal credibility in issue." *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, ¶117. We also note that unlike the instances discussed above, Jones did not object to the state's comments he now claims were improper. Because of that, Jones has waived all but plain error. "An alleged error does not constitute plain error unless, but for the

error, the outcome of the trial clearly would have been otherwise. * * * Notice of plain error must be taken with utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Baldev*, Butler App. No. CA2004-05-106, 2005-Ohio-2369, ¶12.

{¶58} Jones claims that the following excerpts during the state's closing constitute vouching. "You also heard testimony from two police officers and one detective. What motive did they have to lie? None. They were lawfully serving the public and enforcing the law. They had no connection to either of these individuals, the defendant or the victim. All three testimonies were corroborated, accurate, reasonable, and consistent with [Putnam's] testimony." We cannot say that this statement constituted improper vouching. There is nothing within the context of the statement that suggests the prosecutor implied knowledge of facts outside the record or offered any statement other than the witnesses had no motive to lie.

{¶59} Jones also claims that the following statements during the state's rebuttal constitute vouching, in which the state referenced Putnam's testimony that he was unable to identify Jones from the night of the incident. "He says he never saw the man before. He never even saw him. He didn't even recognize his face, and if you talk about being dishonest, that is the utter truthfulness. If he wanted to nail this guy at any cost, he would have said, 'Oh, yeah, I recognize his face. I can tell you exactly who it was.' But he's being honest. He's being truthful. No, I saw some black kid in my car wearing a red hoodie, and there was instantaneous, [sic] and I chased him down. That is the epitome of truthfulness * * *." These statements were not improper given that they were offered on rebuttal, and made to refute Jones' argument that Putnam could not identify him as the suspect from the night of the incident. The prosecutor merely argued that Putnam was a reliable witness and was responding directly to defense counsel's

attacks on Putnam's credibility. Further, the prosecutor referenced facts in evidence rather than implying credibility based on facts outside the record or the prosecutor's personal belief.

{¶60} While the previous two statements were offered properly, we express our dismay regarding the prosecutor's statement during rebuttal regarding Detective Vanderyt's testimony. "[A]ll of a sudden Detective Vanderyt is going to lie. This is not Hollywood. This is real life. This man, Detective Vanderyt, would take the stand and commit perjury, and if that happened, he should be prosecuted, he should be fired, and that, again, makes no sense." Unlike the previous comment, the state neglected to tie its argument into any testimony or evidence, and instead offered a disingenuous suggestion that Vanderyt should be fired or prosecuted if his testimony was less than truthful. This court recognizes that the prosecution's statement was improper, and strongly cautions the state against statements such as these that do not relate to the evidence deduced at trial.

{¶61} We also agree with Jones that the prosecutor's statement denigrating defense counsel's strategy was improper. During rebuttal, the prosecutor stated, "now to sit there and say, quite frankly, you're allowed to be incensed a little bit, because to take their argument, you have to find both [Putnam] and Detective Vanderyt is lying, and that there's no evidence of [sic]." The state could have easily addressed Jones' argument without telling the jury that it was permitted to be incensed by defense counsel's strategy of questioning the witnesses' credibility. Jones had the right to offer a defense, and the state is not in the position to denigrate such defense or infer to the jury that it should be incensed by Jones executing his constitutional right to defend the charges against him. See *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, ¶307, (finding prosecutor's statements improper where prosecutor disparaged defense

counsel's strategy of attacking DNA statistics).

{¶62} Although we have found these two statements improper, we cannot say that they rise to the level of plain error or caused Jones to have an unfair trial. Instead, these two instances were only a small portion of the state's closing argument and rebuttal, and did not result in a prolonged pattern of misconduct.

{¶63} Recently, this court reversed Russell Lee Dougherty's conviction and ordered a new trial after finding that Dougherty was denied a fair trial by a continued pattern of prosecutorial misconduct. *State v. Dougherty*, Butler App. Nos. CA2010-02-036, CA2010-02-037, 2011-Ohio-788. After identifying several incidents of improper statements by the prosecutor, we considered what impact the improper statements had on the trial. We were unable to conclude that the jury would have convicted Dougherty regardless of the statements because the evidence was not overwhelming enough to overcome the possible prejudicial effect the misconduct had on the trial. However, unlike *Dougherty*, we can confidently state that irrespective of the improper statements, the jury would have convicted Jones' of the charges against him. The evidence that Jones committed the charged offenses was overwhelming, and in the context of the case at bar, the improper statements were not plain error. The outcome of Jones trial would not clearly have been otherwise, and there are no exceptional circumstances to warrant reversal in order to prevent a manifest miscarriage of justice. Jones' first assignment of error is overruled.

{¶64} Assignment of Error No. 2:

{¶65} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT KOBE JONES WHEN IT DENIED APPELLANT'S MOTION TO SUPPRESS EVIDENCE."

{¶66} In his second assignment of error, Jones argues that the trial court erred

by denying his motion to suppress statements made to Detective Vanderyt. There is no merit to this argument.

{¶67} Appellate review of a ruling on a motion to suppress presents a mixed question of law and fact. *State v. Cochran*, Preble App. No. CA2006-10-023, 2007-Ohio-3353. Acting as the trier of fact, the trial court is in the best position to resolve factual questions and evaluate witness credibility. Id. Therefore, when reviewing the denial of a motion to suppress, a reviewing court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Oatis*, Butler App. No. CA2005-03-074, 2005-Ohio-6038. "An appellate court, however, independently reviews the trial court's legal conclusions based on those facts and determines, without deference to the trial court's decision, whether as a matter of law, the facts satisfy the appropriate legal standard." *Cochran* at ¶12.

{¶68} Jones moved the trial court to suppress statements he made to Detective Vanderyt regarding his participation in the theft, and various other car break-ins that had occurred in the area surrounding Putnam's home. At the beginning of the motion to suppress hearing, the parties stipulated that Jones had been arraigned on December 15, 2008 and had counsel appointed at that time. Jones made the comments in question during an interview by Vanderyt the following day, December 16, 2008, without counsel present.

{¶69} During the motion to suppress hearing, Vanderyt testified that he interviewed Jones on December 16, aware that Jones had been arraigned the previous day. Jones told Vanderyt that he had been arraigned and had received counsel, but that he had not spoken with counsel and was unaware who his attorney was.

{¶70} Vanderyt testified that he was aware of the charges against Jones, but that he was there to ask about other break-ins in the area. "I went to the jail to question him

about several car break-ins that we had in the township prior to -- the last two months prior to that we had over 50 car break-ins, and I was questioning him about the other car break-ins in the area." At the time Vanderyt questioned Jones, he was not assigned to investigate the burglary aspect of the case against Jones, and was "solely there for" the other car break-ins.

{¶71} Vanderyt testified that he advised Jones of his rights under *Miranda* and that Jones waived his rights and agreed to speak with him. Jones specifically signed a statement detailing his *Miranda* rights after initialing each line of the waiver form. Vanderyt also testified that "when I read him his rights, I asked him if he would like to have his attorney present," and that Jones agreed to waive his rights and speak to him without having his appointed attorney there.

{¶72} Vanderyt informed Jones that the purpose of his questions was to investigate the car break-ins in the area, and Jones began discussing his criminal history regarding car break-ins in various areas of Butler County. During Jones' statement, he alluded to receiving the stolen credit cards found on his person on the night of his arrest, and spoke of his participation in the break-ins that occurred within a mile of Putnam's home. Jones continued to discuss the break-ins in the areas surrounding Putnam's home and discussed the two men with whom he performed the break-ins. When Vanderyt asked Jones if the two men were the same ones he was supposed to meet on the night he was apprehended, Jones confirmed that he was speaking of the two men he was to have met on the night he was arrested.

{¶73} At that point, Vanderyt stated, "well, since we started talking about this * * * why don't you just tell me what happened that night then." Jones stated that he and the two men intended to meet at 11:30 to break into cars, but that he "got started himself" when the two men did not show. Jones then recounted how he approached Putnam's

garage door, entered the vehicle, took the bag of coins, and "took off running" when Putnam came into the garage and began chasing him.

{¶74} Jones argues that the trial court erred in denying his motion to suppress because Vanderyt could not interrogate Jones once counsel was appointed at Jones' arraignment. Jones relies on *Michigan v. Jackson* (1986), 475 U.S. 625, 633, 106 S.Ct. 1404, in which the Supreme Court held that a request for counsel at an arraignment is treated as an invocation of the Sixth Amendment right to counsel "at every critical stage of the prosecution," so that a subsequent *Miranda* waiver is per se invalid. However, the court has since overruled the per se rule of *Jackson* in its more recent decision, *Montejo v. Louisiana* (2009), __ U.S. __, 129 S.Ct. 2079.

{¶75} In *Montejo*, the court held, "our precedents also place beyond doubt that the Sixth Amendment right to counsel may be waived by a defendant, so long as relinquishment of the right is voluntary, knowing, and intelligent. * * * The defendant may waive the right whether or not he is already represented by counsel; the decision to waive need not itself be counseled." Id. at 2085. (Internal citations omitted).

{¶76} By overruling *Jackson*, the court eliminated the per se invalidation of *Miranda* waiver once counsel was requested. Jones therefore admits that his waiver is not per se invalid. However, Jones argues that his confession should have been suppressed based on the rule set forth in *Edwards v. Arizona* (1981), 451 U.S. 477, 484-485, 101 S.Ct. 1880, that once "an accused has invoked his right to have counsel present during custodial interrogation … [he] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."

{¶77} While Jones was undisputedly appointed counsel, he did not invoke his *Miranda* rights at any time prior to his interview with Vaderyt, and relies solely on his

appointment of counsel at arraignment to demonstrate that he invoked his rights. However, the *Montejo* court specifically stated, "we have in fact never held that a person can invoke his Miranda rights anticipatorily, in a context other than 'custodial interrogation[.]' * * * What matters for *Miranda* and *Edwards* is what happens with the defendant is approached for interrogation, and (if he consents) what happens during the interrogation – not what happened at any preliminary hearing." *Montego*, 129 S.Ct. at 2091, quoting *McNeil v. Wisconsin* (1991), 501 U.S. 171, 182, 111 S.Ct. 2204, fn. 3. The record is void of any reference to Jones invoking his *Miranda* rights, and instead, contains Jones' signed and initialed waiver form, as well as testimony from law enforcement that Jones waived his *Miranda* rights each time police questioned him.

{¶78} Jones next asserts that his waiver was not made voluntarily because Detective Vanderyt did not inform him that he would be asking questions specific to the charges for which Jones was arrested. However, the Fifth Amendment does not require a defendant to waive his rights each time a new subject matter is discussed by law enforcement, and "the Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege." *Colorado v. Spring* (1987), 479 U.S. 564, 574, 107 S.Ct. 851.

{¶79} The Ohio Supreme Court has similarly held that after a valid waiver of *Miranda* rights, police may question a suspect on unrelated or different crimes than that which was originally suggested at the beginning of the interrogation. *State v. Tibbetts*, 92 Ohio St.3d 146, 2001-Ohio-132. In *Tibbetts*, the court adopted the holding in *Spring* that a suspect need not know or understand every consequence of waiving *Miranda* rights. The court applied *Spring*, and found that Tibbetts's waiver was not given involuntarily when police began to question him on a receiving stolen property charge, and then began to question him regarding his murdered wife.

{¶80} Beyond the subject-matter of Vanderyt's questions, we find that Jones made his statements voluntarily, and after a valid waiver of his *Miranda* rights. "In determining whether a confession is involuntary, a court 'should consider the totality of the circumstances, including the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement.'" *State v. Green*, 90 Ohio St.3d 352, 366, 2000-Ohio-182, quoting *State v. Edwards* (1976), 49 Ohio St.2d 31, paragraph two of the syllabus.

{¶81} Jones does not assert that his waiver was made involuntary because he lacked the proper mentality or experience, or due to the manner in which he was interrogated. Nor does the record indicate that the length or intensity was improper or that Vanderyt used any threat or inducement in his interrogation method. Based on the totality of circumstances regarding the interrogation, Jones' waiver was made voluntarily.

{¶82} The record is clear that Jones did not invoke his *Miranda* rights, and instead, waived them voluntarily before he began discussing the break-in at Putnam's home. Having found that Jones waived his *Miranda* rights voluntarily, the trial court did not err in denying his motion to suppress and Jones' second assignment of error is overruled.

{¶83} Assignment of Error No. 3:

{¶84} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT KOBE JONES BY ENTERING A VERDICT OF GUILTY TO COUNT ONE OF THE INDICTMENT, BURGLARY, A FELONY OF THE SECOND DEGREE, AND BY IMPOSING SENTENCE UPON APPELLANT AS SUCH."

{¶85} In this third assignment of error, Jones asserts that the trial court erred by imposing a six-year prison sentence for burglary, when the jury instructions contained

the definition of a fourth-degree burglary, rather than the second-degree felony charged in the indictment. This argument lacks merit.

{¶86} The trial court gave the following instruction regarding the burglary charge against Jones: "before you can find the defendant guilty, you must find beyond a reasonable doubt that on or about the 14th day of December, 2008, and in Butler County, Ohio, the defendant did by force, stealth, or deception, trespassed in an occupied structure of in a separately secured or separately occupied portion of an occupied structure that was a permanent or temporary habitation of any person when any person other than an accomplice of the defendant was present or likely to be present." This language tracks the statutory language of a violation of R.C. 2911.12(A)(4), a felony of the fourth degree.

{¶87} The crime for which Jones was indicted was a violation of R.C. 2911.12(A)(2), a felony of the second degree. R.C. 2911.12 (A)(2) requires the additional element that the defendant possessed "the purpose to commit in the habitation any criminal offense." Jones did not object to the error in the jury instruction, and has therefore waived all but plain error. *State v. Skatzes*,104 Ohio St. 3d 195, 2004-Ohio-6391, ¶52. As stated previously, an alleged error does not constitute plain error unless, but for the error, the outcome of the trial clearly would have been otherwise. *State v. Baldev*, 2005-Ohio-2369 at ¶12.

{¶88} The improper instruction does not rise to the level of plain error, as we are unable to state that Jones would not have been convicted had the instruction included the final element. Instead, the jury was well-aware that the state had a burden to prove that Jones entered the garage with the purpose of committing theft. During opening argument, the state expressly listed the four elements of burglary, including its burden to prove that Jones entered "with purpose to commit in the habitation any criminal

offense."

{¶89} Throughout trial, the state offered evidence that Jones entered the garage in order to break into the car, and steal its contents. The jury heard evidence that Jones was in Putnam's area specifically to commit theft offenses, and that Jones took the Crown Royal bag full of coins from the vehicle.

{¶90} The prosecution also reviewed all four elements during its closing argument, and expressly addressed "element four, did the defendant act with purpose to commit a theft in that garage?" The state reiterated the evidence it had offered throughout trial, and later restated the element in its rebuttal. "But finally, the fourth one. This is very, very important. You said you wouldn't raise or lower the burden, and I know you have every intent not to do that, but you look clearly at the words. The state has to prove that he went with a purpose to commit a theft offense. * * * We only have to prove that he went in there with purpose to commit a theft offense."

{¶91} Although the jury instruction itself did not specifically list the element, the jury had been expressly advised at least three times that the state had the burden to prove that Jones entered the garage with "the purpose to commit in the habitation any criminal offense." Taken into consideration with the overwhelming evidence of guilt, we are unable to say that the result of the trial would have been different if the jury instruction had expressly included the element.

{¶92} Jones relies heavily on our decision in *State v. Hover*, Warren App. No. CA2004-12-150, 2005-Ohio-5897, in which this court found that the trial court committed plain error by failing to instruct the jury on an essential, material element of the offense. However, in *Hover*, the trial court misstated the definition for "knowingly," the mental state required to prove the crime of receiving stolen property. We recognized that the trial court's misstatement from a correct instruction on "knowingly" rendered its

instruction "confusing and extremely difficult, if not impossible, for the average juror to follow." Id. at ¶30. We also noted that the trial court made a serious error in defining "knowingly" by discussing possibilities rather than probabilities. This distinction became very important because the outcome of the case hinged on witness credibility and the defense strategy centered on the idea that Hover did not know that the property in his garage was stolen. After reviewing the errors, we were unable to state that the jury would have convicted Hover if it had been given the proper definition of knowingly.[1]

{¶93} Here, however, the jury was properly instructed on the requisite mental states, and the trial court properly defined the terms of the missing element within the jury instructions regarding robbery, including purpose, theft offense, and habitation. In addition to having the element defined, though unlisted, the jury had been informed three times that the state had the burden to prove the fourth element. Unlike an incorrect definition for the required mental state, the missing element under the burglary charge did not render the instruction confusing or impossible to follow, nor did the conviction rest upon credibility issues as in *Hover*.

{¶94} Having found that the incomplete jury instruction did not rise to the level of plain error, and that the results of his trial would not have been different, Jones' third assignment of error is overruled.

{¶95} For this reason, we also note that any ineffective assistance of counsel claims contemplated by Jones would be fruitless. Jones was represented by the same attorney at the trial level and during this appeal. During oral arguments, counsel

1. We also note that this case differs from our recently-released case, *State v. Jones*, Butler App. No. CA2010-04-084, 2011-Ohio-1717, in which we found that the trial court properly instructed the jury on robbery under R.C. 2911.02(A)(3), a third-degree felony, even though the appellant was originally indicted for robbery under R.C. 2911.02(A)(2), a second-degree felony. There, the trial court properly instructed the jury on the lesser included offense because the state failed to prove the elements of the second-degree robbery charge, but offered sufficient evidence to proceed on the third degree charge. Here, however, there was sufficient evidence to instruct the jury on the second-degree burglary charge.

admitted that he failed to object to the jury instruction error, as well as objections to the improper statements by the prosecutor we have addressed in Jones' first assignment of error. However, Jones need not raise an App.R. 26 application to reopen his appeal because we sua sponte recognize that any ineffective assistance of counsel claim would fail under the *Strickland* standard, which requires us to find that Jones' trial counsel's performance was deficient; and second, that the deficient performance prejudiced the defense to the point of depriving Jones of a fair trial. *Strickland v. Washington* (1984), 466 U.S. 668, 689, 104 S.Ct. 2052.

{¶96} Although we acknowledge that Jones' trial counsel was deficient in not objecting to the jury instructions, we cannot say that the result of Jones' trial would have been different if the objection were properly raised. Therefore, Jones did not receive ineffective assistance of counsel at either the trial level, or on appeal.

{¶97} Judgment affirmed.

BRESSLER and RINGLAND, JJ., concur.