[Cite as *State v. Gilbert,* 2011-Ohio-4340.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2010-09-240
	:	O P I N I O N
- vs -		8/29/2011
	:	
ORLANDO DANTE GILBERT,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2010-02-0202

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

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HENDRICKSON, J.

{¶1} Appellant, Orlando Dante Gilbert, appeals a decision of the Butler County Court of Common Pleas convicting him of aggravated robbery.

{¶2} On November 30, 2009, Sherman Fleetwood rode his bicycle to the U.S. Bank in Hamilton to cash his veteran's check. After cashing his check, he rode his bicycle to the U.S. Market, a neighborhood corner store, to purchase money orders and pay the tab he had accumulated from buying items on credit. At the market, Fleetwood noticed appellant and

Anthony Barefield, appellant's co-defendant. According to Fleetwood's testimony, he had "watched them [defendants] grow up," and that he had a long history with Barefield's grandmother, Toni Collier, with whom he attended church. While waiting in line, Fleetwood sorted cash he received from his veteran's check. He separated money to purchase money orders to pay bills, to give his wife for spending money, and to keep for his spending money. After he paid his tab and purchased money orders, Fleetwood rode his bicycle to his house located two or three blocks from the market.

{¶3} According to Fleetwood's testimony, he chained his bicycle to his neighbor's fence and went inside his house. Once inside, Fleetwood gave his wife the money orders to pay bills and her spending money. His wife then heard someone knocking on the door. Fleetwood first ignored the knock, then his wife again heard a knock on the door, but Fleetwood did not see anyone. Fleetwood testified that "about ten seconds later" he heard a rattling noise, like someone was trying to unchain his bicycle.

{¶4} Fleetwood testified that he went outside and observed appellant trying to take his bicycle. Then, Barefield stepped out from behind a bush wearing a sheer mask, stuck a gun in Fleetwood's rib cage, and demanded the money on Fleetwood's person. Fleetwood gave Barefield $205. Fleetwood testified that as Barefield was running away, Barefield took off the mask and looked back as if to see if Fleetwood would chase him. Fleetwood then instructed his wife to call the police and Collier.

{¶5} Officer Casey Johnson received a call regarding a robbery and, after checking the area "very quickly," he arrived at Fleetwood's house. According to Officer Johnson's testimony, Fleetwood was "Nervous, upset * * * definitely excited, something had obviously happened." Fleetwood gave a description of the incident and the individuals, and stated that approximately $200 was stolen. Fleetwood testified that he did not tell Officer Johnson that he knew these individuals because he wanted them to "make this right" by apologizing and

returning the money.

{¶6} Fleetwood testified that after Officer Johnson left, he rode his bicycle to the square where he saw appellant. According to Fleetwood's testimony, when he asked appellant at the square why he did this, appellant replied, "I'm so sorry." On January 7, 2010, Fleetwood identified appellant in a lineup.

{¶7} Collier, Barefield, and Fleetwood testified that Collier and Barefield went to Fleetwood's house after appellant was indicted and paid Fleetwood $205. Fleetwood testified that Barefield also apologized. However, Fleetwood testified that he could not drop the charges because there were "no charges to drop."

{¶8} Collier testified that initially Fleetwood wanted $20, and then later he wanted $205. Barefield also testified that Fleetwood was trying to extort money from them. However, Detective Patrick Erb testified that Barefield never told him about the extortion when Detective Erb interviewed Barefield at police headquarters on March 15, 2010.

{¶9} On February 3, 2010, appellant was indicted by a Butler County Grand Jury for aggravated robbery in violation of R.C. 2911.01(A)(1), with a firearms specification. On June 7, 2010, the trial court granted the state's motion for joinder of appellant's case with Anthony Barefield's case.

{¶10} In addition to Fleetwood and Officer Johnson testifying for the state, Detective James Smith, Detective Don Taylor, and Sam Nassar, the manager of the market, testified. Detective Erb testified as a state's rebuttal witness. Collier, Barefield's uncle, and Barefield testified for the defense. While Barefield testified and offered an alibi, appellant did not testify.

{¶11} After a two-day jury trial, appellant was found guilty of aggravated robbery.[1]

1. Barefield was found guilty of aggravated robbery with a firearms specification and also found guilty of having weapons while under disability.

The firearms specification was dismissed.

{¶12} Appellant appeals his conviction for aggravated robbery and raises four assignments of error.

{¶13} Assignment of Error No. 1:

{¶14} "APPELLANT ORLANDO DANTE GILBERT 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."

{¶15} Appellant argues prosecutorial misconduct occurred by suggesting Nassar was a reluctant witness and "when it suggested to jurors in a question to the witness [Nassar] that he was 'scared' to testify against Appellant and Barefield." Appellant further argues prosecutorial misconduct occurred during various stages of the trial, namely, the opening statement, Fleetwood's testimony, and closing arguments.

{¶16} A prosecutor's conduct is not a ground of error "unless the conduct deprives defendant a fair trial." *State v. Sharp*, Butler App. No. CA2009-09-236, 2010-Ohio-3470, ¶96. "Whether improper remarks constitute prosecutorial misconduct requires analysis as to (1) whether the remarks were improper and, (2) if so, whether the remarks prejudicially affected the accused's substantial rights." *State v. Jackson*, 107 Ohio St.3d 300, 2006-Ohio-1, ¶142. "The touchstone of analysis 'is the fairness of the trial, not the culpability of the prosecutor.'" Id., quoting *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S.Ct. 940. A trial will not be deemed unfair "if, in the context of the entire trial, it appears clear beyond a reasonable doubt that the jury would have found the defendant guilty even without the improper comments." *Sharp* at ¶97, quoting *Jackson* at ¶142.

{¶17} First, we will address appellant's argument that prosecutorial misconduct occurred when the prosecutor suggested that Nassar was a reluctant witness and "when it suggested to jurors in a question to the witness [Nassar] that he was 'scared' to testify against Appellant and Barefield." According to the Rules of Professional Conduct, an attorney shall not "state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused." Prof.Cond.R. 3.4(e). A question may be asked if there is a good faith belief that a factual predicate for the question exists. Id. See, also, *State v. Gillard (*1988), 40 Ohio St.3d 226, 231, overruled on other grounds by *State v. McGuire*, 80 Ohio St.3d 390, 1997-Ohio-335; *State v. Benge* (Dec. 5, 1994), Butler App. No. CA93-06-116, 1994 WL 673126, at *22.

{¶18} Generally, leading questions are only permitted on cross-examination. Evid.R. 611(C). Leading questions may also be used regarding preliminary matters. *State v. Stearns* (1982), 7 Ohio App.3d 11, 13; Evid.R. 611(A). In addition, leading questions may be used to develop the testimony of a witness on direct examination or "[w]hen a party calls a hostile witness, an adverse party, or a witness identified with an adverse party * * *." Evid.R. 611. Exceptions to the use of leading questions are "quite broad and places the limits upon the use of leading questions on direct examination within the sound discretion of the trial court." *State v. Penwell*, Fayette App. No. CA2010-08-019, 2011-Ohio-2100, ¶21, quoting *State v. Lewis* (1982), 4 Ohio App.3d 275, 278. "Absent an abuse of discretion and a showing of material prejudice, a trial court's ruling on the admissibility of evidence will be upheld." *In re State v. S.D.K.*, Warren App. Nos. CA2007-08-105, CA2007-08-106, 2008-Ohio-3515, ¶28. Whether or not a witness is hostile is also within the discretion of the trial court. *State v. Minneker* (1971), 27 Ohio St.2d 155, 158. The term abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *State v. LaMar,* 95 Ohio St.3d 181, 191, 2002-

Ohio-2128, ¶40.

{¶19} Here, the prosecutor began his questioning of Nassar with a series of leading questions:

{¶20} "Q. All right. Safe to say that you don't want to be here this morning, do you?

{¶21} "A. No, not really. * * *

{¶22} "Q. In fact, you were subpoenaed to be here yesterday, correct?

{¶23} "A. Yes.

{¶24} "Q. And you didn't show up yesterday, did you?

{¶25} "A. No.

{¶26} "Q. And we had to issue a warrant for you, didn't we?

{¶27} "A. Yes."

{¶28} After this exchange, defense counsel objected to the questioning because the prosecutor was leading the witness and treating him as a hostile witness before the witness showed hostility. However, the court overruled the objection, stating that the "witness is hostile. He doesn't want to be here." The court found that the leading questions went to preliminary matters. Therefore, the trial court had discretion to allow the leading questions. While attorneys are prohibited from expressing opinions regarding certain matters, the witness did not come to court despite a subpoena and a warrant was issued for his arrest. These nonactions by the witness gave the prosecutor a factual predicate for his questions and did not constitute improper opinion.

{¶29} Later in the testimony, the following exchange took place:

{¶30} "Q. I'm talking about on November 30th. Mr. Nassar, I know you don't want to be here.

{¶31} "MR. WASHINGTON [appellant's trial counsel]: Objection.

{¶32} "THE COURT: It's not a question. Please rephrase. Put it in the form of a

question. Sustained.

{¶33} "Q. Mr. Nassar, I certainly know you don't want to be here, but please tell us how many young boys you seen [sic]."

{¶34} No objection followed the trial court's intervention sustaining the initial objection.

{¶35} Here, the initial objection was sustained because no question was asked. The prosecutor still had a factual predicate for the content of his statement. Overall, Nassar's testimony benefitted appellant. Nassar's testimony revealed that he remembered seeing Fleetwood at the market on November 30 and recalled that Fleetwood "pulled out a bunch of money out of his pocket." Nassar also remembered seeing Barefield at the market on the same day, but could not recollect seeing appellant at the market that day. The trial court did not abuse its discretion in allowing this line of questioning. In addition, the prosecutor's questioning regarding a collateral matter did not affect appellant's substantial rights.

{¶36} On redirect, the prosecutor asked if "Meecy's son [Barefield]" was looking at Fleetwood's money at the market. Nassar responded, "I cannot judge." The prosecutor then stated, "But you put down in your statement that he [Barefield] was looking at his [Fleetwood's] money?" Nassar replied, "I think that's a faulty statement." The prosecutor responded with the question, "You are scared to be here his morning, aren't you?" Nassar then stated, "Not really scared * * *," but he later affirmed that he did not want to be there. There was no objection by counsel regarding this line of questioning, and therefore appellant has waived all but plain error. *State v. Wyatt*, Butler App. No. CA2010-07-171, 2011-Ohio-3427, ¶22.

{¶37} "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Crim.R. 52(B). Thus, despite the absence of an objection, a ruling court may reverse a trial court when plain error exists, but is not required to correct them. *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68. "Pursuant to

Crim.R. 52(B), plain error exists where there is an obvious deviation from a legal rule that affected the defendant's substantial rights or influenced the outcome of the proceedings." *Wyatt at* ¶23. "Notice of plain error * * * is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus. An appellate court will only reverse a trial court's decision on plain error grounds if the outcome of the trial would have been different. *Wyatt* at ¶23.

{¶38} Nassar did not want to be in court testifying and disputed information he made in a prior statement, thus giving the prosecutor a good faith belief that a factual predicate for the question existed. Given the plain error standard we cannot say the question amounted to a manifest miscarriage of justice or altered the outcome of the trial.

{¶39} Appellant also argues prosecutorial misconduct occurred during the opening statement, Fleetwood's testimony, and closing arguments. Defense counsel failed to object in these instances, making plain error the proper standard of review.

{¶40} Regarding the opening statement, appellant states that the prosecutor did more than read the indictment. The appellant argues that the prosecutor "provided a gratuitous and irrelevant statement calculated to convey that the fact of an indictment strengthened the State's case and that the allegations set forth therein had been personally adopted by the county prosecutor and members of the grand jury."

{¶41} "In *State v. Graven* (1977), 52 Ohio St.2d 112, syllabus, the Ohio Supreme Court held that the trial court has discretion in a criminal case to permit the jury to take the indictment into the jury room. If it is proper for the jury to take the indictment into the jury room where they can read it in its entirety, then appellant cannot be prejudiced by the fact that the prosecutor read the entire indictment during opening statements." *State v. Begley* (Dec. 21, 1992), Butler App. No. CA92-05-076, at 4. In addition, counsel generally has wide

latitude in opening statements. *State v. Adkins* (2001), 144 Ohio App.3d 633, 641.

{¶42} Here, appellant's counsel did not object to the reading of the entire indictment during opening statements. While we believe it is better practice for the prosecutor to outline the state's case as opposed to read the indictment in opening statements, we cannot conclude that it was improper. See *Begley* at 4-5. In addition to reading the indictment, the prosecutor stated, "[b]oth indictments are signed by the Butler County Prosecuting Attorney, Robin Piper, and the assistant of the Grand Jury and the foreperson of the Grand Jury." This additional information may be irrelevant as appellant alleges because it does not add any information to the indictment. While the indictment was not admitted into evidence, the jury would have been able to see who signed the indictment if they had taken the indictment with them to the jury room, which is a permitted, but not favored, practice.[2] Trial courts have the sole discretion in deciding whether to allow the jury to take the indictment with them during deliberations, provided the trial court gives the proper jury instructions. Here, the judge gave the jury the following instructions: "The case before you began with an indictment. An indictment informs the defendants that they have been charged with a crime. The fact that it was filed may not be considered for any purpose." A jury is presumed to follow the instructions of the trial judge. *State v. Garner*, 74 Ohio St.3d 49, 59, 1995-Ohio-168. Although irrelevant, we cannot say the outcome of the trial would have been different absent the prosecutor's additional statements regarding the signatures on the indictment. The prosecutor's conduct in this instance does not constitute plain error.

{¶43} Appellant also argues improper testimony was elicited by the prosecutor from Fleetwood. Appellant asserts that a portion of Fleetwood's testimony was improper because

2. "Reading the indictment or information by the court or by counsel is as unnecessary as reading the pleadings in a civil case. In addition, it unduly emphasizes the finding by the grand jury." Ohio Jury Instructions (2011), Section 413.01, at 83.

it was hearsay and the declarant was not identified on the record; it was irrelevant; it was a contravention of appellant's right to confront witnesses; it was an improper effort to bolster the credibility of Fleetwood; and it compounded the prejudicial effect of the opening statement. According to the record, while there was an objection made by defense counsel, the objection was withdrawn. Again, we must consider this testimony under a plain error standard.

{¶44} Hearsay is defined as "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).

{¶45} Considering Fleetwood's testimony, his comments leading up to the objection and withdrawal of the objection were in response to the following question posed by the prosecutor: "And tell us what happened, and who was with Anthony Barefield, and tell us what it is that happened." Fleetwood testified that he tried to reach out to family members and was not "getting any help." Then there was an objection and withdrawal of the objection. The court told Fleetwood to "[g]o ahead." Fleetwood then questioned whether or not he should go ahead, and the prosecutor responded "[y]es." Fleetwood continued: "Okay. After I was asked to testify in front of the Grand Jury because I never pressed any charges because I was asked to press charges at least three times, and I kept saying no because I had my wife to think about and my son to think about, so I didn't want to do that. So I was asked then please testify in front of the Grand Jury. If it doesn't make any sense, we will throw it out. And if it makes sense, we got your back, so I testified in front of the Grand Jury * * *." It is possible this elicited statement was not made for the truth of the matter asserted, but only to show why Fleetwood took the actions he did regarding not pressing charges and deciding to testify before the grand jury, and was therefore not hearsay. See *State v. Craft*, Butler App. No. CA2006-06-145, 2007-Ohio-4116, ¶51, quoting *State v. Thomas* (1980), 61

Ohio St.2d 223, 232, ("Ohio courts have repeatedly held that 'extrajudicial statements made by an out-of-court declarant are properly admissible to explain the actions of a witness to whom the statement was directed,' rather than to prove the truth of the matter asserted"). However, even construing the statement for the truth that "they" had Fleetwood's "back," we cannot see how its admission changed the outcome of the trial. Therefore, the admission of the statement does not constitute plain error.

{¶46} Concerning closing arguments, appellant argues that the prosecutor provided improper "personal opinions that went beyond the evidence, suggesting, without support, the intimidation of witnesses by Appellant or his family members." Prosecutors are given "a certain degree of latitude in summation" at closing arguments. *State v. Smith*, Butler App. No. CA2007-05-133, 2008-Ohio-2499, ¶6. "A prosecutor may comment upon the testimony and suggest the conclusions to be drawn from it, but a prosecutor cannot express his personal belief or opinion as to the credibility of a witness or as to the guilt of the accused, or go beyond the evidence which is before the jury when arguing for a conviction." Id. at ¶7. "The state's closing argument is reviewed in its entirety to determine whether the allegedly improper remarks were prejudicial." Id. at ¶9. If beyond a reasonable doubt the defendant would have been found guilty absent the improper comments, the trial will not be deemed unfair. Id. No objection was made by defense counsel regarding closing arguments. Therefore, we will evaluate appellant's argument under a plain error standard.

{¶47} Appellant contends that the following statements by the prosecutor were improper:

{¶48} "I [Fleetwood] had to live in that neighborhood with these guys. I'm fearful. Even talked about he tried to make contact with Orlando's father. Said that didn't go well. Pointed to the side of his face. He told you he was fearful. You saw Sam Nassar this morning. He didn't want to be here. He didn't want to testify. That's the culture down there,

ladies and gentlemen."

{¶49} Appellant alleges that the prosecutor's statements add an additional element of wrongdoing and implied knowledge of intimidation of the witnesses.

{¶50} Fleetwood's testimony consists of the following:

{¶51} "* * * I already reached out to four family members, Mr. Gilbert's father twice, and that was a disaster * * *."

{¶52} Again Fleetwood stated when explaining why he did not want to press charges:

{¶53} "[W]hen their family failed to come to me after I reached out to his father and told him twice, and he just let it go over the top of his head, I didn't have no [sic] choice. They forced my hand."

{¶54} Fleetwood also stated:

{¶55} "There was [sic] no charges to drop. I tried, I tried. But I was not going to live the rest of my live [sic] in my own community living in fear * * *."

{¶56} Fleetwood stated in his testimony he was in fear and that he reached out to appellant's father. While pointing to his face may not have been put before the jury in evidence, we cannot say the outcome of the trial would have been different absent the comment with the similarities of the prosecutor's statements in closing arguments and Fleetwood's testimony.

{¶57} Appellant further maintains that the portion of the prosecutor's closing argument regarding Nassar's reluctance to testify was improper. However, because we do not believe the trial court abused its discretion in allowing the leading questions, the statements regarding Nassar being a reluctant witness were before the jury.

{¶58} Appellant also asserts that the prosecutor's statement constituted an improper appeal to racial bias when he said: "That's the culture down there * * *." "Certainly, appeals to racial or religious prejudices are improper conduct on the part of a prosecutor and may

exert such a substantial influence on the result at trial that reversal is required." *State v. Rahman* (1986), 23 Ohio St.3d 146, 152. However, while Fleetwood referred to the "black community" in his testimony, the prosecutor's use of "there" in closing arguments references a geographical location not a particular race. Throughout closing arguments the prosecutor tried to illustrate that Fleetwood lived in a small community where he would have to continue to interact with the defendants and the defendants' families. We cannot say this was an appeal to racial bias or that the outcome of the trial would have been different absent the statement.

{¶59} Appellant's first assignment of error is overruled.

{¶60} Assignment of Error No. 2:

{¶61} "THE TRIAL COURT COMMITTED PLAIN ERROR DURING JURY INSTRUCTIONS."

{¶62} Appellant alleges that the following portion of the jury instructions was prejudicial: "Orlando Gilbert has been charged with Aggravated Robbery. Some of the evidence has been, however, that the aggravated robbery was committed by more than one person." Appellant asserts that this statement gave the appearance the trial court believed an aggravated robbery was committed and shows what facts it believed was demonstrated by the evidence. Trial counsel failed to object to the jury instructions. Therefore, we will review appellant's second assignment of error under a plain error standard.

{¶63} A trial court must be aware of the effect of its remarks or comments on the jury. *State v. Sharp*, Butler App. No. CA2009-09-236, 2010-Ohio-3470, ¶113, citing *State v. Wade* (1978), 53 Ohio St.2d 182, 187, vacated and remanded on other grounds *Wade v. State* (1978), 438 U.S. 911, 98 S.Ct. 3138. "It is well known * * * that juries are highly sensitive to every utterance by the trial judge." Id. However, an appellate court must review jury instructions as a whole. *State v. Hamilton*, Butler App. No. CA2001-04-098, 2002-Ohio-3862,

¶15, citing *State v. Coleman* (1988), 37 Ohio St.3d 286, 290.

{¶64} Here, after the alleged improper jury instruction the trial court goes on to say: "A person may be convicted of aggravated robbery, of course, if he is the main or sole actor in the commission of the offense, but he may also be convicted of that crime if he has been complicit in that commission of the offense." The trial court used the word "may" in regard to the commission of the offense throughout the jury instructions.

{¶65} In addition, the trial court states: "If, during the course of the trial, the Court said or did anything that you consider an indication of the Court's view of the facts, you are instructed to disregard it. The judge must be and sincerely desires to be impartial in presiding over this and every other trial before a jury and without a jury." Such an instruction directs the jury to disregard any statements that may have shown the trial court's view. *State v. Vanloan*, Butler App. No. CA2008-10-259, 2009-Ohio-4461, ¶26. The presumption is the jury followed that instruction. Id.

{¶66} Thus, viewing the jury instructions as a whole, we cannot say the statements affected the outcome of the trial.

{¶67} Appellant's second assignment of error is overruled.

{¶68} Assignment of Error No. 3:

{¶69} "APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION, WHICH DENIAL RESULTED IN PREJUDICE."

{¶70} Appellant argues he did not have effective assistance of counsel because trial counsel failed to seek relief from prejudicial joinder, object to hearsay testimony elicited from Fleetwood, move for a mistrial and seek severance after Fleetwood's alleged improper testimony, and object to the instances of alleged prosecutorial misconduct.

{¶71} *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, established a two-part test to find ineffective assistance of counsel. First, the defendant "must show that counsel's performance fell below an objective standard of reasonableness." *State v. Madrigal,* 87 Ohio St.3d 378, 388, 2000-Ohio-448, citing *Strickland* at 687-688. Second, counsel's performance must have prejudiced the defendant. Id.

{¶72} Regarding the first prong, there is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. "In the absence of positive proof to the contrary, certainly there is a reasonable inference that one licensed by the state to practice law and appointed by a court to represent an accused did competently and properly represent such accused during his trial." *Vaughn v. Maxwell* (1965), 2 Ohio St. 2d 299, 301. There is a presumption that the challenged action may be "sound trial strategy" that the defendant must overcome. *State v. Leggett* (Sept. 17, 2001), Warren App. No. CA2000-10-089, at 3.

{¶73} Regarding the second prong, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland* at 694. See, also, *State v. Burke*, 97 Ohio St.3d 55, 2002-Ohio-5310, ¶6. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. "A defendant's failure to satisfy one prong of the *Strickland* test negates a court's need to consider the other." *Madrigal* at 389, citing *Strickland* at 697.

{¶74} First, appellant alleges ineffective assistance of counsel because trial counsel failed to object to the state's motion for joinder.

{¶75} Crim.R. 8(B) provides for the joinder of defendants "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses, or in the same course of criminal conduct." "The court

may order two or more indictments or informations or both to be tried together, if the offenses or the defendants could have been joined in a single indictment or information." Crim.R. 13. "Joinder of defendants and the avoidance of multiple trials is favored in the law for many reasons. Joinder conserves judicial and prosecutorial time, lessens the not inconsiderable expenses of multiple trials, diminishes inconvenience to witnesses, and minimizes the possibility of incongruous results in successive trials before different juries." *State v. Thomas* (1980), 61 Ohio St.2d 223, 225. However, Crim.R. 14 allows separate trials if joinder causes a prejudicial effect. Antagonistic defenses may be so prejudicial that they can deny a fair trial, nonetheless severance is not mandated. *State v. Humphrey*, Clark App. No. 2002 CA 30, 2003-Ohio-3401, ¶68.

{¶76} We cannot conclude that it was an unreasonable trial strategy for trial counsel not to oppose the state's motion for joinder. At the stage in the proceedings when appellant's counsel should have opposed the state's motion for joinder, there was no indication in the record that the defendants planned to present antagonistic defenses, nor were such defenses presented at trial. The offenses charged were of a similar character and arose out of the same incident. Each case required the same witnesses. Neither codefendant tried to pin the robbery on the other. Barefield testified that he never said it "wasn't my idea." Trial counsel may have reasonably believed that the jury was more likely to believe that Fleetwood was attempting to extort money from the defendants by trying them together. Because we find counsel's approach reasonable, trial counsel's conduct in this instance did not fall below professional standards. In addition, there is no guarantee the trial court would have granted appellant's objection to the state's motion for joinder if actually made.

{¶77} Second, we address appellant's contention that trial counsel's failure to object to Fleetwood's testimony that Barefield said "it wasn't my idea" constitutes ineffective assistance of counsel. Appellant argues that the statement is "a clear ***Bruton*** error." *Bruton*

v. United States (1968), 391 U.S. 123, 88 S.Ct. 1620.

{¶78} "In *Bruton*, the Supreme Court held that in a joint trial of two defendants, a confession of one co-defendant who did not testify could not be admitted into evidence even with a limiting instruction that the confession could only be used against the confessing defendant. The rationale of *Bruton* was that the introduction of a potentially unreliable confession of one defendant which implicates another defendant without being subject to cross-examination deprives the latter defendant of his right to confrontation guaranteed by the Sixth Amendment." *State v. Moritz* (1980), 63 Ohio St.2d 150, 153, quoting *United States v. Fleming* (C.A.7, 1979), 594 F.2d 598, 602. Whether a confession is made to the police or a prosecution witness, the constitutional implications are the same. *Moritz* at 154. However, the confrontation clause is not implicated when the declarant is present for cross-examination at trial in order to defend or explain the prior testimonial statements. *State v. Bryant*, Warren App. No. CA2007-02-024, 2008-Ohio-3078, ¶49, citing *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354, fn. 9.

{¶79} Here, appellant's codefendant, who was the declarant, testified at trial. Therefore, appellant was given the opportunity to cross-examine his codefendant regarding the testimonial statements and the confrontation clause was not implicated.

{¶80} Appellant also argues that this statement constitutes impermissible hearsay. However, a statement does not comprise of hearsay if "the statement is offered against a party" and it is "the party's own statement." Evid.R. 801(D)(2). Failing to object alone is not enough to render counsel ineffective. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶103.

{¶81} Here, Fleetwood testified that: "He [Barefield] comes by and says Mr. Fleetwood I'm sorry for what you [sic] did here is your money, and I said whose idea was it? And he said, it wasn't my idea." The first part of Fleetwood's statement is admissible only

against Barefield, as an admission by a party opponent.

{¶82} The statement "he said, it wasn't my idea" constitutes inadmissible hearsay. However, failing to object should not have affected the outcome of the trial. One may infer from this statement that the robbery may have been appellant's idea, but Barefield testified that he did not have any knowledge of appellant participating in a robbery. In addition, there is ample other evidence implicating appellant. Fleetwood testified he heard "a loud noise rattling on my bike like somebody was trying to pull it off of the fence." When Fleetwood went outside he observed appellant rattling his bicycle, and then Barefield then came out of the bushes and stuck a gun in his side. Fleetwood also testified he saw appellant at the market earlier in the day, that after the robbery he saw appellant at the square where he said he was "so sorry," and identified appellant in a lineup. Detective Smith testified that while interviewing the appellant, appellant offered to pay back the $205. With this testimony, there is no reasonable probability that the outcome of the proceeding would have been different had trial counsel objected to the hearsay statement.

{¶83} Third, we consider whether failing to move for a mistrial and seek severance for a retrial after Fleetwood's statement constituted ineffective assistance of counsel. "[M]istrials need be declared only when the ends of justice so require and a fair trial is no longer possible." *State v. Garner,* 74 Ohio St.3d 49, 59, 1995-Ohio-168. It is within the sound discretion of the trial court as to deny or grant a motion for a mistrial. Id. Here, trial counsel did not move for a mistrial, but whether or not to move for a mistrial is a tactical decision and is well within the range of competent assistance of counsel. *State v. Riffle* (1996), 110 Ohio App.3d 554, 558. See, also, *State v. Leggett* (Sept. 17, 2001), Warren App. No. CA2000-10-089, at 4.

{¶84} Lastly, appellant asserts that counsel was ineffective because he did not object to the alleged instances of prosecutorial misconduct. However, we find the outcome of the

trial would be no different absent the comments of the prosecutor. Therefore, we cannot say appellant was harmed by trial counsel not objecting to the alleged instances of prosecutorial misconduct.

{¶85} Given the strong presumption of professional competency and the fact that there is no reasonable probability the outcome of the trial would have been different, appellant received effective assistance of counsel.

{¶86} Appellant's third assignment of error is overruled.

{¶87} Assignment of Error No. 4:

{¶88} "THE CUMULATIVE EFFECT OF MULTIPLE ERRORS PREJUDICED APPELLANT, DENYING HIM HIS RIGHT TO A FAIR TRIAL."

{¶89} In his last assignment of error, appellant argues that "the cumulative impact upon Appellant's right to a fair trial was adversely impacted and the collective effect of the errors resulted in prejudice to Appellant."

{¶90} Pursuant to the doctrine of cumulative error, "a conviction will be reversed where the cumulative effect of errors in a trial deprives a defendant of the constitutional right to a fair trial even though each of the numerous instances of the trial court error does not individually constitute cause for reversal." *State v. Garner*, 74 Ohio St. 3d at 64. However, "[t]here can be no such thing as an error-free, perfect trial, and * * * the Constitution does not guarantee such a trial." *State v. Hill*, 75 Ohio St.3d 195, 212, 1996-Ohio-222, quoting *United States v. Hasting* (1983), 461 U.S. 499, 508-509, 103 S.Ct. 1974, 1980.

{¶91} We do not believe the errors that occurred in this case, in the aggregate, affected appellant's substantial rights. Few errors were found and sheer numbers of errors that do not affect substantial rights cannot become prejudicial. Id. See, also, *State v. Jackson*, 107 Ohio St.3d 300, 2006-Ohio-1, ¶160. Also, there was ample evidence despite the errors to convict appellant. See *Jackson* at ¶160. We find that appellant was not

deprived of a fair trial.

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

{¶93} Judgment affirmed.

POWELL, P.J., and HUTZEL, J., concur.