[Cite as *State v. Green*, 2009-Ohio-5529.]

IN THE COURT OF APPEALS FOR GREENE COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2007 CA 2
v.	:	T.C. NO. 2005 CR 581
ROGER SHAWN GREEN	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
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O P I N I O N

Rendered on the 16th day of October, 2009.

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FROELICH, J.

{¶ 1} Roger Shawn Green was convicted by a jury in the Greene County Court of Common Pleas of aggravated murder, with a principal offender specification, and aggravated robbery. The court sentenced Green to life in prison

without parole for the murder and to ten years in prison for aggravated robbery, to be served consecutively.

{¶ 2} Green appeals from his conviction, arguing that his convictions were based upon insufficient evidence, that the trial court erred in failing to grant his motions to suppress, that his counsel rendered ineffective assistance, that the court improperly allowed certain evidence and expert testimony to be admitted, that the court should have ordered a mistrial, that his indictment was defective, and that aggravated murder and aggravated robbery are allied offenses of similar import. For the following reasons, the trial court's judgment will be affirmed.

I

{¶ 3} According to the State's evidence, Green met Kim Shumway ("Shumway"), nee Lykins, in the 1980s. The two have a now-teenaged child together, and they have had an on-and-off romantic relationship. For three or four years, Shumway was married to Jeremy Shumway, with whom she had another daughter, and between 2001 and December 2003, Shumway had a relationship with Brian Martin. Green and Shumway renewed their romantic relationship in December 2003. At that time, Shumway was addicted to methamphetamine, and she had a history of "running through money."

{¶ 4} In late 2003, Green became acquainted with John Banks, who was Shumway's friend and drug supplier. Banks obtained methamphetamine from Glenn Grootegoed, a drug dealer who resided in Arizona. Green later stated that he was introduced to Banks "for the purpose of being an intermediary to get more time for Mr. Banks to pay off a debt that he owed, $17,500, to someone that gave

Mr. Banks a large quantity of methamphetamine drugs." Banks made payments of $5,000 and $700 on the debt, and Green claimed that, by February 2004, Banks owed approximately $11,000. Jeramiah Snyder, Grootegoed's step-son and "collector," indicated that Banks had owed Grootegoed approximately $15,000.

{¶ 5} In early February 2004, Banks asked several friends and acquaintances for money, and they observed that Banks had a wad of cash, likely totaling thousands of dollars. On the evening of February 6, 2004, Green assisted Banks in getting money from various people in order to pay his debt. Green later told detectives that he and Banks spent the evening of February 6 at Banks' home with other individuals. Banks and Green left Banks' home shortly before midnight, and they drove separately to a BP gas station at Yankee Drive and State Route 725 near the Dayton Mall. That was the last time that any witness saw Banks alive.

{¶ 6} On February 7, 2004, Green and Shumway left Ohio for Gatlinburg, Tennessee, where the two were married and honeymooned. Upon returning to Ohio, the two made plans to move from their apartment at a Waynesville, Ohio, campground to an apartment in Chillicothe, Ohio. Green contacted Snyder about borrowing a 9 mm Taurus handgun, and he told Snyder that he had gotten rid of a Star 9 mm gun that he had previously owned.

{¶ 7} On February 19, 2004, a Greene County Sanitary Engineering employee found Banks' frozen body down a path at the Sugarcreek Riding Center in Sugarcreek Township. Banks was wearing a leather Raiders jacket, a ball cap, blue jeans, and tennis shoes, and his pockets contained his driver's license and $4.02. Banks had been shot with seven Federal HydroShok hollow-point 9 mm

bullets, and he had died from his gunshot wounds.

{¶ 8} The police soon focused their attention on Green. In March 2004, Detective James Deaton of the Sugarcreek Township Police Department obtained an unspent HydroShok 9 mm bullet from the co-owner and landlord of the Waynesville campground, who had found the bullet while cleaning out Shumway's and Green's former apartment. In June 2004, detectives from Ross and Greene Counties executed a search warrant at Shumway's residence in Chillicothe, where they recovered coats with gun shot residue on the sleeves. On July 27, 2004, detectives interviewed Green at the Chillicothe Correctional Institute ("CCI"), during which Green informed the detectives that he knew who was last with Banks and who had killed him, but Green would not identify the individual(s).

{¶ 9} On August 4, 2005, Green was indicted for aggravated murder and aggravated robbery. The aggravated murder indictment included the specification that Green had purposefully caused the death of Banks while committing or attempting to commit aggravated robbery and that Green was the principal offender, which made him eligible for the death penalty.

{¶ 10} Green filed numerous motions prior to trial, including motions to suppress the bullet retrieved from the Waynesville apartment and the statements he made on July 27, 2004. Both motions to suppress were denied. Green also sought to exclude some of the State's evidence, including expert testimony regarding the bunter marks on bullet cartridge casings and gun shot residue. These motions were also denied.

{¶ 11} A jury trial was held over several days in November 2006. After

deliberations, Green was convicted of both charges and the principal offender specification. As stated above, he was ultimately sentenced to life without parole for the aggravated murder, to be served consecutively to a ten-year sentence for the aggravated robbery.

{¶ 12} Green appeals from his convictions, raising eight assignments of error.

II

{¶ 13} Green's first assignment of error states:

{¶ 14} "I. "THE TRIAL COURT ERRED AND DENIED MR. GREEN HIS RIGHT TO DUE PROCESS OF LAW UNDER THE OHIO AND UNITED STATES CONSTITUTIONS WHEN IT OVERRULED MR. GREEN'S RULE 29 MOTION FOR ACQUITTAL BECAUSE THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO SUPPORT THE CONVICTIONS."

{¶ 15} In his first assignment of error, Green claims that his convictions were not supported by sufficient evidence. Green argues that the State failed to produce sufficient evidence that he committed a robbery against Banks, that he was the actual killer of Banks, or that he was involved with Banks' homicide.

{¶ 16} "A sufficiency of the evidence argument disputes whether the State has presented adequate evidence on each element of the offense to allow the case to go to the jury or sustain the verdict as a matter of law." *State v. Wilson*, Montgomery App. No. 22581, 2009-Ohio-525, at ¶10, citing *State v. Thompkins,* 78 Ohio St.3d 380, 386, 1997-Ohio-52. When reviewing whether the State has presented sufficient evidence to support a conviction, the relevant inquiry is whether

any rational finder of fact, after viewing the evidence in a light most favorable to the State, could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Dennis*, 79 Ohio St.3d 421, 430, 1997-Ohio-372, citing *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d. 560. A guilty verdict will not be disturbed on appeal unless "reasonable minds could not reach the conclusion reached by the trier-of-fact." Id.

{¶ 17} At the outset, we recognize, as do the parties, that the evidence against Green was circumstantial, and there was no direct evidence that Green committed the offenses. However, whether the State's evidence is circumstantial, rather than direct, is irrelevant. Circumstantial evidence and direct evidence have equivalent probative value. *State v. Jenks* (1991), 61 Ohio St.3d 259, 272; *State v. Reynolds*, Montgomery App. No. 19780, 2003-Ohio-7245, at ¶17. Consequently, a defendant may be convicted solely on the basis of circumstantial evidence. *State v. Nicely* (1988), 39 Ohio St.3d 147, 151. In fact, we have noted that circumstantial evidence is often more persuasive than direct evidence. *State v. Reed*, 155 Ohio App.3d 435, 2003-Ohio-6536, at ¶56; see, also, *State v. Jackson* (1991), 57 Ohio St.3d 29, 38 ("circumstantial evidence may be more certain, satisfying, and persuasive than direct evidence.").

{¶ 18} Green challenges his convictions for aggravated robbery, in violation of R.C. 2911.01(A)(3), and aggravated murder, in violation of R.C. 2903.01(B). In order to establish aggravated robbery, the State was required to prove that Green, in attempting or committing a theft offense, as defined in R.C. 2913.01, or in fleeing immediately after the attempt or offense, inflicted or attempted to inflict serious

physical harm on another. R.C. 2911.01(A)(3). The aggravated murder statute provides: "No person shall purposely cause the death of another *** while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit *** aggravated robbery ***." R.C. 2903.01(B).

{¶ 19} According to the State's evidence, Green was aware that Banks had a drug debt of more than $10,000. When Green spoke with Bruce May, Director of the Greene County Agencies for Combined Enforcement (ACE) Task Force, during the investigation of Banks' death, Green told May that Banks had owed $17,500 to someone who had given Banks a large quantity of methamphetamine and that Banks still owed approximately $11,000 on the debt. Jeremiah Snyder confirmed that Banks owed Grootegoed approximately $15,000. Snyder further testified that he had spoken with Green about Banks' debt to Grootegoed, and that Green had commented that "something needs to be done" about Banks. Green had not elaborated to Snyder what he thought should be done.

{¶ 20} Several witnesses testified for the State that Banks was collecting money shortly before his disappearance. Banks' neighbor, Mark Clemons, testified that Banks came by his home at approximately 10:00 a.m. in "February maybe" and asked to borrow money. At that time, Banks "was acting real nervous and jumping around and seem[ed] quite anxious about something," and Clemons observed that Banks had a large amount of money. Clemons "could tell by the hundreds, the layer of hundreds that it was several thousand dollars." Daniel Baker, a friend of Banks, testified that he loaned Banks $400 on a Monday and another $400 on a Friday in the beginning of February 2004. Another friend, Julie Mays-Downs,

observed Banks with a "wad of cash" shortly before he went missing. Green himself told May that on February 6, 2004, he was with Banks beginning at noon and throughout the day assisting him in getting money from various people to pay off the drug debt. Green told May that Banks was storing the money in his pocket.

{¶ 21} Green was the last known person to see Banks alive. Green informed Greene County detectives and Sergeant Robert Burling of the Miami Township Police Department that he was last with Banks in the store of a gas station on the night of February 6. The security video of the interior of the BP gas station located at Yankee Drive and State Route 725 confirmed that Banks and Green were in the store shortly after midnight on February 7, 2004. In the video, Banks was wearing a leather Raiders jacket, a ball cap, blue jeans, and white tennis shoes, which appeared to be the same outfit that he was wearing when his body was found.

{¶ 22} Although the coroner could not specify a date prior to February 19 on which Banks was killed, a missing persons report had been filed for Banks prior to February 14, 2004, when Sergeant Burling assisted Detective Lovely with the missing persons investigation by contacting Green. By that point, Banks' vehicle had been located at Centerville High School. Moreover, Baker, Banks' friend, testified that he learned Banks was missing within three days of lending him money in the beginning of February. Based on the evidence, the jury could have reasonably inferred that Banks was killed on February 7, 2004, or shortly thereafter.

{¶ 23} Beginning on February 7, 2004, Green and Shumway began to engage in suspicious behavior. Although Shumway actively used her cellphone,

there was no activity on Shumway's account between February 7 and February 11. During that time, Shumway and Green left Ohio for Gatlinburg, Tennessee, where they married. Although getting married is not itself suspicious, the wedding was a surprise to several people close to Shumway. Shumway had not told her father, Jimmy Lykins, that she had planned to marry, even though they had recently discussed her broken truck, and Mr. Lykins tried to speak with his daughter weekly. While in Tennessee, the couple paid $99 in cash for a wedding at the Wedding Bells Chapel, and they stayed from February 11, to February 14, at the Honeymoon Hills, a Gatlinburg resort with 28 cabins, paying $344.13 in cash. Darsha Hoskins, who in February 2004 was the manager of Honeymoon Hills, testified that couples usually reserve cabins in advance and the resort usually does not take cash. Green had made the reservation on February 11, the same day that he and Shumway arrived. Hoskins stated, "This was a very rare circumstance."

{¶ 24} Sherry Thies, the owner of the campground in Waynesville where Shumway and Green had been residing together since December 2003, testified that Shumway and Green had been at the campground during the day, every day, and that she recognized their vehicles, a white Chevy 1500 pickup truck (Shumway's) and a white Ford F-150 pickup truck (Green's). After February 6, however, Thies rarely saw Green and Shumway at their apartment, and after February 10, she did not see them there during the day and only knew of their being at their apartment between 2:30 and 4:30 a.m. During the last week of February, Shumway and Green started to move out, and they moved the bulk of their belongings prior to March 10, 2004.

{¶ 25} Thies testified that she was not aware of either Shumway or Green having employment, and, as stated above, she saw them at the campground daily during the day until February 6. Shumway's father testified that Shumway "ran through money," and Shumway's former boyfriend, Brian Martin, stated that Shumway ran out of money "quite a bit." In 2002, Shumway spent $32,000 that she had obtained in a legal settlement within two or three months. In 2003, Shumway received approximately $18,000 in a settlement for an automobile accident; she used the money on drugs and to pay rent. In late 2003, Shumway received approximately $1,300 from Delco. While Shumway lived with Martin, they often borrowed money from Shumway's father to pay bills. When Shumway had a check that she needed to be cashed, Lykins would take it to his bank, cash it, and give her the money. Lykins did not give Shumway money during the week prior to her wedding.

{¶ 26} Despite the apparent lack of income, Shumway and Green spent approximately $450 in Tennessee. Snyder testified that, shortly after returning to Ohio, he met Green and Shumway at a Wal-Mart in Miamisburg, where Green purchased $150 in cocaine from him and Snyder observed them loading a television set they had purchased from Wal-Mart into Green's truck. Snyder testified that Shumway had also owed Grootegoed money for drugs.

{¶ 27} Banks' body was found at the Sugarcreek Riding Center, located at 7636 Wilmington-Dayton Road in Sugarcreek Township, Greene County, on February 19, 2004. Banks was wearing a leather Oakland Raiders jacket, blue jeans, and white tennis shoes, and a ballcap appeared to have fallen off his head.

Banks had his driver's license and $4.02.

{¶ 28} At approximately 12:30 p.m. on February 19, 2004, Sergeant Mark White of the Sugarcreek Township Police Department responded to Sugarcreek Riding Center on a report of a possible deceased body. White collected evidence at the scene, including a 9 mm bullet that was found in the ground under Banks' body and four 9 mm cartridge casings that were found by the fence near the body. On February 22, 2004, four additional cartridge cases were located "in somewhat the same area" as where the other casings had been found.

{¶ 29} An autopsy conducted by Dr. Russell Uptegrove, forensic pathologist at the Montgomery County Coroner's Office, revealed seven entry gunshot wounds to the body, located on the left side of Banks' neck, the left axilla (armpit region), the left upper back, the left mid-back, the right upper arm, the left wrist (this bullet re-entered the left chest), and the right buttocks. Six bullets were recovered from the body. Dr. Uptegrove testified that Banks died from multiple gunshot wounds.

{¶ 30} Chris Monturo, firearm and tool mark expert at the Miami Valley Regional Crime Lab ("MVRCL"), examined the bullets and casings microscopically. Monturo identified the bullets recovered from the body as 9 mm, hollow point, HydroShok bullets manufactured by Federal Cartridge Company. He stated that each of the bullets had the same "class characteristics," meaning that they had the same number and width of lands and grooves, same barrel size, and same twist direction. Monturo then looked for markings within the lands and grooves to determine whether they were fired from the same weapon. The bullets had insufficient unique characteristics to allow him to make a determination whether all

of the recovered bullets were fired from the same gun. Monturo noted that not all 9 mm handguns have the same class characteristics. He testified that a Star 9mm could have fired the bullets, but a Taurus 9 mm gun could not have.

{¶ 31} Monturo also examined the cartridge casings from the crime scene. He stated that the casings were 9 mm and they all had the same class characteristics. Like the bullets, the casings had insufficient markings to allow him to determine whether the casings all came from the same firearm. Monturo examined the bunter marks, which are placed on the cartridge casings by the manufacturer, and testified that the eight fired casings were made with the same bunter tool.

{¶ 32} On March 13, 2004, Sherry Thies entered the apartment formerly occupied by Shumway and Green in order to prepare the apartment for a new tenant. While cleaning the bedroom, Thies located a small silver box containing a single unfired bullet. Thies called Detective Deaton and gave him the container with the bullet. This bullet was also a HydroShok 9mm bullet, and Monturo testified that the bunter mark on the cartridge casing was made by the same bunter tool that made the bunter marks on the casings found at the crime scene. Brian Martin testified that, when he had lived with Shumway at the Waynesville campground between October 2003 and December 2003, he did not have weapons, there were no weapons in the residence, and Shumway did not have any ammunition there.

{¶ 33} Although Green told May that he did not own any firearms prior to Banks' death and that he purchased a weapon from Snyder after Banks had died,

Snyder testified that Green had come to him before Banks went missing regarding a problem he (Green) was having with a Star 9 mm gun. Green had complained that the clip would not stay in the gun, and Snyder observed that Green had the clip duct-taped. Snyder told Green the gun could not be fixed. Snyder testified that the Star was still operational. Snyder further testified that, after Green returned from his honeymoon, the two had a conversation about Green's borrowing a Taurus 9 mm. At that time, Green had told Snyder that he had "gotten rid of" the Star.

{¶ 34} The State presented recordings of two telephone conversations between Green and his sister, Diana Hay, in April 2004, and two conversations between Green and Shumway in May 2004. In one conversation between Green and Hay, Hay told Green that "Greene County" was trying to get Shumway to talk with them, but Shumway would not go. Green had responded, "She knows nothing for real, you know, that I know of." In a second conversation between Green and Hay, Hay told Green that Shumway was planning to move, that she had been with Martin in his truck, that Shumway had told her "the big story" about Greene County "and who did this and who did that," and that Martin was telling Shumway that she would be charged with conspiracy to commit murder and other charges. Hay further stated that Shumway had "flipped all out" when she told Shumway that the police wanted Green's truck. Green told Hay to be "as sweet as possible" to Shumway, that what Shumway "told you is true," and that "we need her."

{¶ 35} In one recorded conversation between Green and Shumway, the two discussed having engaged in criminal activity. Green stated that he "committed the same crime you did, but still I didn't get charged with no cases or anything."

When Shumway asked what she had committed, Green responded: "What did we do together? What did we dispose of together? That's the only thing I'm guilty of." In another conversation, Green and Shumway discussed what appeared to be an anticipated drug transaction. Green stated that he "just wanted it all to stop. But it did though, didn't it."

{¶ 36} On June 7, 2004, a search warrant was executed at Shumway's residence on Egypt Road in Chillicothe, Ohio. The police seized, among other things, a black Carhartt jacket and a Dickies jacket. The State believed that Green had worn one of the coats while at the BP gas station. Gunshot residue was found on sleeves of both coats.

{¶ 37} In his interview with Director May in July 2004, Green told May that he knew who was the last person to be with Banks and that he knew "without a doubt" who had killed Banks. Green would not identify the individual and would not state whether he had seen Banks after leaving the BP convenience store. Green told May that he did not think that Grootegoed could kill anyone.

{¶ 38} Although there is no direct evidence that Green shot Banks at the Sugarcreek Riding Center on February 7, 2004, we conclude that the circumstantial evidence, when viewed in its totality in the light most favorable to the State, was sufficient to for a jury to find that Green committed both aggravated robbery and aggravated murder. Green knew that Banks was collecting money to pay a drug debt and it appeared that he had collected thousands of dollars. Only $4.02 remained in Banks' pocket when he was found dead from multiple gunshot wounds. Green was not employed, he had no apparent source of income, and he was in a

relationship with Shumway, who was addicted to methamphetamine, spent sizable amounts of money quickly, and also had a drug debt. Banks was last seen with Green after midnight on February 7, 2004. Shortly thereafter, Green and Shumway left Ohio, spent money obtained from an unknown source, and, upon their return, purchased a television and began to move from their residence to Chillicothe. Green tried to obtain a new gun, having disposed of a gun that could have fired the fatal bullets, and a bullet was found in Green's former Waynesville residence that was of the same type as those used to kill Banks. Gunshot residue was found on the sleeves of coats found in Shumway's Chillicothe apartment. The telephone conversations further suggested that Green was involved in criminal activity in Greene County, that he had discussed these events with Shumway, and that Green's sister needed to be nice to Shumway so she (Shumway) would not provide incriminating evidence to the police. The State's evidence was sufficient to establish that Green stole Banks' money from him and, as part of the commission of that theft offense, fatally shot him.[1]

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[1] We note that Green presented several witnesses who testified on his behalf at trial, including Irvin Burnham, a computer specialist; Deaton; Hay; Grootegoed; Detective Dan Ryan; Laureen Marinetti, a forensic toxicologist from MVRCL; Suzanne Noffsinger, a trace examiner from MVRCL, and Larry Dehus, an independent forensic scientist. Through these witnesses, Green presented evidence that Green and Shumway had planned to marry since Christmas 2003, that Green had received substantial financial assistance – including several thousand dollars in cash – from Hay, that the coats seized from Shumway's apartment belonged to Shumway, that Shumway did not owe any drug debt to Grootegoed, that Shumway and Green had moved to Chillicothe from Waynesville to get Shumway away from the drug environment, and that Green asked Snyder about a Taurus gun in January 2004, not after Banks was last seen. Dehus testified, in part, that after comparing the bunter marks on the cartridges, he could not conclude, within a reasonable degree of scientific certainty, that the cartridges

{¶ 39} Green also argues that there was insufficient evidence that he was the principal offender, as set forth in the specification to aggravated murder. In this case, there is no evidence that anyone other than Green participated in the robbery and murder. Although Green stated that other individuals were at Banks' house during the evening of February 6, 2004, Green told detectives that he and Banks had left Banks' home at the same time, and the two were seen alone together at the BP gas station. There is no evidence that anyone was with Banks and Green after they left the gas station. The State's evidence indicated that Green had a Star 9 mm handgun and HydroShok bullets. The evidence at trial supported the conclusion Green was the principal offender.

{¶ 40} The first assignment of error is overruled.

III

{¶ 41} Green's second assignment of error states:

{¶ 42} "THE TRIAL COURT ERRED IN OVERRULING MR. GREEN'S MOTION TO SUPPRESS."

{¶ 43} In his second assignment of error, Green claims that the trial court erred in failing to suppress an unspent bullet located in his Waynesville apartment

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were stamped by the same bunter tool. Because Green has not argued that his conviction was against the manifest weight of the evidence, we need not discuss Green's evidence in detail or its effect, if any, on the outcome of Green's trial. We note, parenthetically, that because the jury, as the fact finder, sees and hears the witnesses at trial, we defer to the jury's decisions whether, and to what extent, to credit the testimony of particular witnesses. *State v. Lawson* (Aug. 22, 1997), Montgomery App. No. 16288. An appellate court may, however, determine which of several competing inferences suggested by the evidence should be preferred. Id.

on March 13, 2004, and statements that he made to the police while he was in custody.

{¶ 44} In reviewing the trial court's ruling on a motion to suppress evidence, this court must accept the findings of fact made by the trial court if they are supported by competent, credible evidence. See *State v. Morgan*, Montgomery App. No. 18985, 2002-Ohio-268. However, "the reviewing court must independently determine, as a matter of law, whether the facts meet the appropriate legal standard." Id.

A. *Unspent Bullet in Apartment*

{¶ 45} On December 22, 2005, the trial court held a hearing on Green's motion to suppress the bullet located in the Waynesville apartment. Initially, Green presented evidence as to whether he had standing to challenge the seizure of the bullet. Upon the court's oral ruling that he had standing, the State presented evidence on whether the seizure was proper under the Fourth Amendment. The evidence at the suppression hearing established the following facts.

{¶ 46} In 2003, Shumway and Brian Martin entered into a month-to-month lease for the residence at 9580 Collett Road, located in a campground in Waynesville, Ohio. Martin paid the first month's rent, and Shumway paid thereafter by bringing the $500 rent payment to the property's co-owner and landlord, Sherry Thies, a few days before the rent was due on the first of the month. In December 2003, Martin was ejected from the apartment by Thies. Within a few days, Green moved in with Shumway, with whom he had renewed a romantic relationship. Green informed Thies that he was now living with Shumway at the

residence. Thies testified that Green was a guest, not a lessee.

{¶ 47} On February 10, 2004, Thies entered the property and observed the interior living conditions. At that time, the apartment appeared to be occupied. Thies had also observed that Shumway drove a white, extended cab, four-wheel drive Chevy pickup truck and Green drove a newer white, extended cab Ford pickup truck; Thies stated that both vehicles were at the residence daily while Green and Shumway resided at the property.

{¶ 48} According to Green, at some point in February 2004, he and Shumway decided to move from the Waynesville campground. He explained that "a methamphetamine dealer got shot to death and there was people doing all kinds of other things." Green did not give Thies notice that they were moving out, and he assumed Shumway would do so. Green, Shumway, and Hay began to move Shumway's and Green's possessions from the residence. Green assisted with the move until he was arrested on March 4, 2004, for a parole violation. No rent was paid for March 2004.

{¶ 49} On March 1, 2004, Thies placed a 72-hour notice to vacate on the front door of the residence due to Shumway's non-payment of rent. Green and Hay testified that neither they nor Shumway were aware of the notice. However, Thies received a note from Shumway which stated, in its entirety: "To whom it may concern: I will have the rest of my stuff out by Friday, March 12th. I know you are not allowed to change locks or enter apartment. You have first got to give me a 30 day eviction. You have a 300.00 deposit also. Kim Shumway."

{¶ 50} Hay testified that she and Shumway moved items out of the residence

in mid-March. Thies observed a three-day period prior to March 13 when Shumway and a friend hauled furniture and other belongings from the apartment. After March 10, Thies did not see any vehicles or activity at the apartment, and she observed that the porch light was not on. The trial court expressly found that "neither [Green] nor Kim Shumway ever came back to the apartment after March 13, 2004." As of March 13, 2004, Thies did not consider Shumway and Green to be residents.

{¶ 51} On March 13, 2004, Thies entered the apartment through the unlocked front door in order to clean the property and get it ready to be re-let. Upon entering, Thies found the interior looked dramatically different than on February 10. She noticed a couch that had been cut open and other items that she considered "junk" or "trash." Thies testified that she saw nothing of value, and she believed the residence had been abandoned.

{¶ 52} While Thies was cleaning the bedroom, she found an unspent bullet in a small metal tin. She testified: "First, I just left it there on the desk, thought about it for a little while, while we cleaned up other junk, and remembered that I had Detective Deaton's phone number in my car and thought maybe I should call him at least and let him know that I found this." Thies had had prior conversations with Deaton concerning Green, and Deaton knew that she was the owner/landlord of the apartment. Thies took the bullet from the bedroom and placed it by the front door to give to Deaton.

{¶ 53} At approximately 7:00 p.m., Thies called Deaton and told him that she had found a bullet while cleaning out Green's and Shumway's apartment. Deaton

drove to the campground. When he pulled in, Thies waved for him to come to the doorway of the residence. Thies informed the detective that she had given Shumway and Green a 3-day notice to vacate, that she had seen them moving out, and that the residence was vacated. Deaton stepped into "the little recess where the door is" – no more than a foot inside the residence – and Thies handed him the tin with the bullet. Deaton looked at the bullet and exited the apartment. He placed the bullet in an evidence envelope and went to Thies' office to get a statement from her.

{¶ 54} Deaton stated that he was in the apartment for an "extremely short" period of time – just the time required "for her to hand that to me." He did not go into the apartment to look around, and the trial court found that he did not conduct a search. From the doorway, however, Deaton noticed a torn-up couch and trash on the floor, but nothing of value. He stated: "It appeared to me that it was vacated."

{¶ 55} Thies denied receiving instructions from Deaton or other police officers to contact them if she noticed anything suspicious. Deaton denied instructing Thies to look around the apartment. The trial court found that Thies was not acting as an agent for any law enforcement agency during her observation, retrieval, or delivery of the tin and bullet to Deaton.

{¶ 56} Upon consideration of the evidence, the trial court denied Green's motion to suppress the bullet. The court concluded that Green was an occupant, not a lessee, of the apartment, and that his status was that of a social guest who had no rights greater than that of the leaseholder, Shumway. Once Shumway relinquished her rights to the residence, Green no longer had a reasonable

expectation of privacy. The court found that Shumway "clearly had abandoned her interest in the property prior to March 13, 2004."

{¶ 57} The court further concluded that, even if Green had a protected interest in the property on March 13, 2004, the seizure of the bullet was nevertheless lawful. First, the court noted that the Fourth Amendment does not apply to private parties, and the "actions taken by Sherry Thies in this case were not a function of government involvement." Second, the trial court found that Deaton's actions "were entirely in good faith and if there were any mistake of fact regarding the third party's authority to consent to a search, the United State Supreme Court has held that under these circumstances the exclusionary rule should not be applied. See *Illinois v. Rodriguez*, 497 U.S. 1988 (1990)."

{¶ 58} On appeal, Green argues that the bullet should have been suppressed, because (1) Green had a reasonable expectation of privacy in the apartment as a tenant; (2) Deaton seized the bullet from inside the apartment without a search warrant or an exception to the search warrant requirement; and (3) Deaton could not have reasonably believed that the landlord had common authority over the apartment in order to give consent.

{¶ 59} The Fourth Amendment to the United States Constitution secures an individual's right to be free from unreasonable searches and seizures. Fourth Amendment rights are personal in nature, and they may not be asserted vicariously by third parties. *Rakas v. Illinois* (1978), 439 U.S. 128, 133-34, 99 S.Ct. 421, 58 L.Ed.2d 387. The person challenging the legality of a search bears the burden of proving that he has a legitimate expectation of privacy in the place searched that

society is prepared to recognize as reasonable. *Rakas*, 439 U.S. at 143; *State v. Williams* (1995), 73 Ohio St.3d 153, 166. The individual must have a subjective expectation of privacy in the place searched, and that expectation must be objectively reasonable and justifiable. *Rakas*, 439 U.S. at 143; *State v. Buzzard*, 112 Ohio St.3d 451, 2007-Ohio-373, at ¶14.

{¶ 60} It is well-established that a tenant has an expectation of privacy in his or her rented apartment. "Because the right to exclude others is one of the main rights attaching to property, tenants in lawful possession of a home or apartment generally have a legitimate expectation of privacy by virtue of having a property interest in a specific piece of real estate." *Higgins v. Penobscot Co. Sheriff's Dept*. (D.Me. June 2, 2005), Case No. 04-157-B-W. See, also, *Copley v. Voorhies* (S.D. Ohio Aug. 27, 2007), Case No. 2:06-CV-847, citing *Rakas*, 439 U.S. at 143, fn.12. ("An individual has a 'legitimate expectation of privacy' and, therefore, standing to challenge law enforcement's warrantless search on property that the individual lawfully possesses.")

{¶ 61} However, an individual need not be the owner or possessor of property to have a legitimate expectation of privacy. "A premises need not be one's home in order for one to have a legitimate expectation of privacy in that place. *Minnesota v. Olson* (1990), 495 U.S. 91, 110 S.Ct. 1684. In *Olson*, the Supreme Court held that an overnight guest may have a legitimate expectation of privacy in another's home even when his occupation of the premises is not exclusive. While the expectation generally attaches to one's home or residence, the fact that it does is not a bar to a reasonable expectation of privacy in other

places that a person utilizes for residential purposes." *State v. Dooley*, Montgomery App. No. 22100, 2008-Ohio-1748, at ¶15.

{¶ 62} We need not decide whether Green's expectation of privacy in the apartment stemmed from his status as a tenant, as opposed to an overnight guest, or whether Green and Shumway, in fact, abandoned the apartment. Even assuming, for sake of argument, that Green had a legitimate expectation of privacy in the property on March 13, 2004, the seizure of the bullet was not subject to the exclusionary rule due to the detective's reasonable belief that the landlord had apparent authority to consent to his entry into the apartment.

{¶ 63} As noted by the trial court, the "reasonable belief" portion of the consent exception to the warrant requirement was first articulated in *Illinois v. Rodriguez* (1990), 497 U.S. 177, 110 S.Ct. 2793, 111 L.Ed.2d 148. *Rodriguez* held that the police officers' warrantless search of a residence was valid when the consent to search was given by the defendant's girlfriend, who the police reasonably – but erroneously – believed had common authority to give consent. In reaching this conclusion, the Court emphasized that the essence of the Fourth Amendment is to protect citizens against "unreasonable" searches and seizures. Id. at 183. The Court continued:

{¶ 64} "It is apparent that in order to satisfy the 'reasonableness' requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by agents of the government – whether the magistrate issuing a warrant, the police officer executing a warrant, or the police officer conducting a search or seizure under one of the exceptions to the warrant

requirement – is not that they always be correct, but that they always be reasonable." Id. at 185.

{¶ 65} The Court therefore concluded that, so long as the police reasonably believed that the third-party had the authority to consent to the search, no Fourth Amendment violation had occurred. Accordingly, the relevant inquiry is "whether the facts available to the officer at that time would warrant a reasonable belief that the third party had authority over the premises." *State v. Harris*, Montgomery App. No. 19479, 2003-Ohio- 2519, at ¶15, citing *Rodriguez*, supra.

{¶ 66} Detective Deaton arrived at 9580 Collett Road in response to a telephone call from Thies, whom he knew to be the co-owner and landlord of the apartment. Deaton testified that, when he got to the doorway of the apartment, Thies opened the door and he asked her whose apartment it was. Thies responded that it was Green's or Shumway's. Deaton then asked, "Is this apartment vacated? Have they moved out?" Deaton testified that Thies responded affirmatively. Thies likewise testified that she told Deaton that she had given Shumway and Green a 3-day eviction notice, and that she had seen them moving out and leaving. Thies stated that she told Deaton that the apartment was abandoned. Deaton testified that he believed Thies when she said the apartment had been vacated.

{¶ 67} Although Deaton indicated that he did not walk around the apartment, he stated that, from his vantage point in the recess by the door, "[i]t appeared to me that it was vacated." He noticed trash on the ground and a couch that had been "tore up," but he saw nothing of significant financial value. Deaton did not see

Green or Shumway at the apartment, and their cars were not there. Deaton further testified that he had had a prior conversation with Thies during which Thies had told him the Green and Shumway were moving out.

{¶ 68} Based on the evidence presented at the suppression hearing, the facts available to Detective Deaton were sufficient to warrant a reasonable belief that Thies had authority over the premises. Deaton had had previous conversations with Thies, during which he had learned that Thies was the owner and co-landlord of the premises and that Green and Shumway were moving out of the apartment. When Thies spoke to Deaton on March 13, 2004, she informed him that the apartment had been vacated. The condition of the apartment appeared to corroborate Thies' statement that the apartment had been abandoned, and there was no sign of Green and Shumway or their vehicles. Based on this information, Deaton could have reasonably believed that the apartment, in fact, had been abandoned and that Thies, as the landlord, had the authority to consent to his entry into the apartment.

{¶ 69} The trial court did not err in overruling Green's motion to suppress the bullet.

B. *Green's Statements While In Custody*

{¶ 70} Next, Green asserts that the trial court erred in failing to suppress statements that he made to Director May and Detective Deaton on July 27, 2004, while he was incarcerated at the Chillicothe Correctional Institution ("CCI"). He claims that he had been held in solitary confinement, at the request of law enforcement officers, for 17 days and that his statements were not voluntary

because he had been promised that he would not have to return to solitary confinement if he spoke to the officers.

{¶ 71} The trial court held hearings on Green's motion on June 29, 2006, and September 27, 2006, which revealed the following facts.

{¶ 72} On June 7, 2004, May and Deaton, with assistance from the Ross County Sheriff's Department, executed search warrants at Hay's and Shumway's homes. At that time, Green was incarcerated at CCI, and May wished to have Green's cell searched simultaneously with the execution of the two search warrants; the officers were interested in any correspondence that Green might have.

{¶ 73} An officer from Ross or Greene County contacted Paul Arledge, an investigator working in the Central Office of the Department of Corrections, who called Captain James Trainer, then-Corrections Captain at CCI, to request that Green be placed in the Segregation Unit due to an "external" (i.e outside of the prison) law enforcement investigation. According to Prison Investigator Jennifer Wessel's and Arledge's testimony, prison investigators have the authority to place inmates in isolation for up to 21 days; Trainer testified that prison rules authorize an inmate to be placed in isolation due to an outside criminal investigation. CCI documentation revealed that Green was placed in the Segregation Unit at 12:15 p.m. on June 7, 2004. Green's property was inventoried and packed up at 12:45 p.m. on the same date. Green was released from the Segregation Unit on June 23, 2004, based on Wessel's authorization.

{¶ 74} At approximately 10:00 a.m. on July 27, 2004, May and Deaton went

to CCI to interview Green. The officers wore casual civilian attire, and they were unarmed inside the facility. The interview occurred in Wessel's office, a 16-by-16 foot room with three desks. May sat at one desk with Green, Deaton sat at another desk and took notes of the interview, and Wessel sat at her desk. Wessel was not involved in the interview.

{¶ 75} When Green was brought to Wessel's office, he was "slightly confrontational" and "irritated" that he had previously been "placed in the hole," meaning that he had been in solitary confinement, and that letters had been taken from his cell. Green believed that May was responsible for his isolation. May testified: "I explained to him that I didn't even know that he was in the hole until that second, that I was not responsible for it, and then I explained to him our purpose for the visit." May informed Green that he and Deaton were investigating the homicide of John Banks, that Green was "an important person in the homicide, that I wished to talk to him about it and it was his choice." Green immediately asked, "Am I a suspect in that?" May responded to him, "Yes, you are. As a matter of fact you were the last one that we know that was with him, and I would like some clarity for that and that's why I wish to talk to you." Green agreed to talk with the officers.

{¶ 76} May told Green that he wanted to read Green his *Miranda* rights. Although Green expressed that he already knew his *Miranda* rights, May reviewed each right with Green and presented Green with a pre-interview form. Green verbally stated that he understood his rights, and he initialed each one and checked each paragraph. Green told May the number of years of schooling he had and that

he could read and write. Green signed the form and waived his *Miranda* rights.

{¶ 77} May interviewed Green for approximately one and one-half hours. May testified that Green was calm and did not appear to be "crazy" or under the influence of anything. During the interview, Green elected not to answer certain questions. For example, Green stated that he knew who had murdered Banks, but he did not want to answer who that individual was. At no point did Green ask for an attorney or to stop the interview. Green did not ask for water or to use the bathroom. May denied making any promises or threats to Green prior to or during the interview. May and Deaton informed Green that there would be no reprisals for talking to the officers. May and Deaton denied directing Green to be placed "in the hole" in June 2004, and they both testified that they first learned that Green had been placed in isolation when they spoke with Green on July 27, 2004.

{¶ 78} Initially, we note that "[w]hether a statement was made voluntarily and whether an accused voluntarily, knowingly, and intelligently waived his right to counsel and right against self-incrimination are distinct issues." *State v. Eley* (1996), 77 Ohio St.3d 174, 178; *State v. Kelly*, Greene App. No. 2004-CA-20, 2005-Ohio-305, at ¶10. In order for a defendant's statements made during a custodial interrogation to be admissible, the prosecution must establish that the accused knowingly, voluntarily, and intelligently waived his Fifth Amendment right against self-incrimination. *State v. Edwards* (1976), 49 Ohio St.2d 31, 38, overruled on other grounds, (1978), 438 U.S. 911, 98 S.Ct. 4137, 57 L.Ed.2d 1155; *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694.

{¶ 79} Even when *Miranda* warnings are not required, a defendant's

statement may be excluded as involuntarily made. *Kelly* at ¶11. "The test for voluntariness under a Fifth Amendment analysis is whether or not the accused's statement was the product of police overreaching." *State v. Finley* (June 19, 1998), Clark App. No. 96-CA-30; *State v. Dailey* (1990), 53 Ohio St.3d 88, 92, citing *Moran v. Burbine* (1986), 475 U.S. 412, 421, 106 S.Ct. 1135, 89 L.Ed.2d 410. "In deciding whether a defendant's confession is involuntarily induced, the 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." *Edwards,* 49 Ohio St.3d at paragraph two of the syllabus; see *State v. Brewer* (1990), 48 Ohio St.3d 50, 58; *State v. Marks*, Montgomery App. No. 19629, 2003-Ohio-4205. Although a defendant's mental state is significant in determining whether a waiver is voluntary, "it alone does not determine voluntariness without some relation to official coercion." *State v. Velez* (Mar. 20, 1998), Columbiana No. 96-CO-48; see *Eley*, 77 Ohio St.3d at 178 ("Evidence of police coercion or overreaching is necessary for a finding of involuntariness, and not simply evidence of a low mental aptitude of the interrogee.").

{¶ 80} Whether a statement was voluntarily given is a question of law, which we review de novo. *Arizona v. Fulminante* (1991), 499 U.S. 279, 287, 111 S.Ct. 1246, 113 L.Ed.2d 302; *State v. Booher* (1988), 54 Ohio App.3d 1, 7. "However, weighing the evidence and determining witness credibility at suppression hearings are matters within the sound discretion of the trial court." *State v. Sutphin* (June

30, 1999), Greene App. No. 98CA140.

{¶ 81} In its decision, the trial court found that Green's statements were voluntary and that the officers had complied with *Miranda*. It stated:

{¶ 82} "It is the position of the defendant in part, and he so argues, that being placed in the hole by the authorities at CCI in someway [sic] affected his ability to voluntarily make his statements to Detective May and Sergeant Deaton.

{¶ 83} "However, the Court specifically finds that the actions taken by the authorities at the Chillicothe Correctional Institute were independent of the interview by Detective May and Sergeant Deaton. The evidence fails to establish that any action taken by CCI or the officers was coercive in design. The Court recognizes that the defendant was placed in segregation as a result of the CCI decision that during the search of this cell he needed to be moved for the security investigation, and, the search of the cell was related to the investigation of the homicide which took place in Greene County Ohio. However, again, this Court does not find that this action was designed in anyway [sic], by anyone, to be a ploy [or] some form of coercion designed to overcome the defendant's free will at the interview. This was an administrative action properly authorized under the rules of the Chillicothe Correctional Institute and was not designed in any part by Detective May and Sergeant Deaton. The Court simply does not find any connection between the defendant being in the hole and the interview that took place on July 27, 2004. This is further supported by the passage of over 30 days between the action taken by CCI and the interview.

{¶ 84} "This Court finds that absent evidence that the defendant's will was

over born by coercive police conduct such that his right to self determination was critically impaired, the Court must find the statement to be voluntary. Based upon the facts the Court has found in this case, the Court does not find that any conduct of the law enforcement officers was coercive in anyway."

{¶ 85} The trial court further found that "the completion of the written form, the circumstances surrounding the advising of the rights and the written waiver of those rights identified in State's exhibit 1 establish full compliance with the *Miranda* Rule beyond a reasonable doubt." (Internal citations omitted.)

{¶ 86} We find no fault with the trial court's decision. Although the record supports Green's assertion that his placement in the Segregation Unit in June 2004 was precipitated by the Greene County detectives' desire to have his cell searched for correspondence, there is no evidence that the officers' conduct was intended to be coercive or that it, in fact, had a coercive effect on Green. Green's relocation to the Segregation Unit was in accordance with prison administrative procedures. May and Deaton both testified that they did not know until they spoke with Green on July 27, 2004, that he had been placed in solitary confinement, and they informed Green of that fact. We find it significant, as did the trial court, that more than a month had passed between Green's release from solitary confinement and the interview with May and Deaton. The detectives did not make any promises or threats to Green, before or during the interview, in order to get Green to talk with them. May informed Green that there would be no reprisals as a result of their conversation.

{¶ 87} Other factors also support the conclusion that Green's statements

were voluntary. At the time of the interview, Green was 33 years old, had 15 years of schooling, and he had had prior experience with the criminal justice system. The interview occurred at approximately 10:15 a.m. in Investigator Wessel's office, a 16-by-16 foot room with three desks. Green sat at a desk with May, who was unarmed and wearing casual civilian attire; Wessel and Deaton sat at nearby desks. The interview lasted for approximately one and one-half hours. Green did not appear to be under the influence of drugs or alcohol, and he did not seem to be mentally impaired. The detectives did not deny Green any basic necessities, such as water, food, or bathroom breaks. Significantly, during the interview, Green elected not to answer certain questions asked of him. May and Deaton had not previously interviewed Green.

{¶ 88} Under the totality of the circumstances, there is no evidence of police overreaching or coercion, and the trial court properly concluded that Green's statements were voluntarily given.

{¶ 89} In addition, the trial court did not err in concluding that Green had knowingly, voluntarily, and intelligently waived his *Miranda* rights. Prior to questioning Green, May informed Green that he wanted to read his *Miranda* or constitutional rights. May testified: "We did so. I went through a pre-interview form, which lists categorically in paragraphs the Constitutional rights. He not only verbally said that he understood those rights, he initialed each one and checked each paragraph as we went through them. He also gave me years he went to school, that he could read and write, signed all of that and then signed a waiver at the bottom of that form saying that he wished to talk to us." May indicated that he

went through the constitutional rights even though Green expressed that he already knew his constitutional rights. Based on the record, there is no evidence that Green's waiver of his constitutional rights was coerced or otherwise involuntary. To the contrary, Green indicated that he understood his rights, and the record supports that his waiver was knowing, intelligent, and voluntary.

{¶ 90} The trial court did not err in denying Green's motions to suppress.

{¶ 91} The second assignment of error is overruled.

IV.

{¶ 92} Green's third assignment of error states:

{¶ 93} "MR. GREEN WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS [TO] THE UNITED STATES CONSTITUTION AND ARTICLE I SECTION 10 OF THE OHIO CONSTITUTION."

{¶ 94} In his third assignment of error, Green asserts that his trial counsel rendered ineffective assistance in several respects. He claims that his trial counsel should have renewed his motion to suppress the unspent bullet seized at the Waynesville apartment, that counsel should have objected to various statements made by the prosecutor during closing argument, and that counsel should have objected to the introduction of certain evidence. Green further claims that the cumulative effect of these errors warrants reversal of his conviction. We will address these arguments in turn.

{¶ 95} To reverse a conviction based on ineffective assistance of counsel, it must be demonstrated both that trial counsel's conduct fell below an objective

standard of reasonableness and that the errors were serious enough to create a reasonable probability that, but for the errors, the result of the trial would have been different. *Strickland v. Washington* (1984), 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136. Trial counsel is entitled to a strong presumption that his or her conduct falls within the wide range of reasonable assistance. *Strickland*, 466 U.S. at 688. Deficient performance means that claimed errors were so serious that the defense attorney was not functioning as the "counsel" that the Sixth Amendment guarantees. *State v. Cook* (1992), 65 Ohio St.3d 516, 524.

A. *Failure to Renew Motion to Suppress*

{¶ 96} We begin with Green's claim that his trial counsel was ineffective in failing to renew the motion to suppress the unfired round that was found in the apartment shared by Green and Shumway in Waynesville. Green argues that the testimony of Sherry Thies, Jimmy Lykins, and Brian Martin at trial established that Green was a tenant of the apartment and that Green and Shumway had not abandoned the apartment when Thies entered the residence on March 13, 2004. Green asserts that Thies' and Martin's testimony indicates that there was no written lease for the apartment and that Martin had pre-paid the last month's rent. Green further cites to Thies' testimony at trial in which she stated that she "really cannot recall exactly how I got into the apartment, but I'm thinking that I had to take the screen off of the window to the right of the door and raise the window to go in, but I cannot be a hundred percent sure on that. *** I can't remember if the door was locked at that time." Thies had testified at the suppression hearing that she

entered through the door, which was unlocked.

{¶ 97} Initially, the record does not support the conclusion that no written lease was signed, and Thies' testimony at trial did not substantially affect the trial court's conclusion that the apartment had been abandoned. Although Thies did not have a prepared form lease agreement, she testified that she had Martin "sign some little thing that I just typed up real quick like on the computer saying it was a month-to-month lease." She further testified that she leased the apartment to Shumway and Martin, and that Shumway was on the original lease; Green was never listed on a lease. Thus, Thies' trial testimony was consistent with her testimony at the suppression hearing that there was a written lease, which Green had never signed.

{¶ 98} Moreover, Thies' testimony at trial was consistent with her testimony at the suppression regarding whether Shumway had abandoned the apartment. Thies testified at trial that she had received a note from Shumway that she would be out of the apartment by March 10. Thies stated that she had seen Shumway and others moving the possessions out of the apartment after February 22 and she noticed Shumway taking boxes out of the apartment during the beginning of March. Thies stated at trial that no one came back to the apartment after March 10. Based on the testimony at trial, Green's defense counsel could have reasonably concluded that the trial testimony would not have affected the trial court's ruling on the motion to suppress.

{¶ 99} Regardless, the evidence cited by Green has no effect on whether Detective Deaton reasonably relied on Thies' representation that the apartment was

abandoned and entered the apartment based on her consent. Nothing presented at trial raised any doubt that the facts available to Deaton were sufficient to warrant a reasonable belief by Deaton that Thies had authority over the premises. Accordingly, there is no reasonable probability that the outcome of the motion to suppress would have been different had counsel renewed the motion to suppress after hearing the trial testimony of Thies, Lykins, and Martin. Accordingly, counsel was not ineffective in failing to renew the motion to suppress.

B. *Failure to Object to Statements by Prosecutors*

{¶ 100} Next, Green claims that his trial counsel was ineffective by failing to object to various statements by the prosecutor during closing argument. In determining whether Green's counsel should have objected to the prosecutor's statements, we first consider whether those statements constituted prosecutorial misconduct.

{¶ 101} In reviewing claims of prosecutorial misconduct, the test is "whether remarks were improper and, if so, whether they prejudicially affected substantial rights of the accused." *State v. Jones*, 90 Ohio St.3d 403, 420, 2000-Ohio-187. "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, 947, 71 L.Ed.2d 78. Where it is clear beyond a reasonable doubt that a jury would have found the defendant guilty even absent the alleged misconduct, the defendant has not been prejudiced and his conviction will not be reversed. See *State v. Loza* (1994), 71 Ohio St.3d 61, 78, 1994-Ohio-409. We review the alleged wrongful conduct in the context of the entire trial. *State v.*

Stevenson, Greene App. No. 2007-CA-51, 2008-Ohio-2900, at ¶42, citing *Darden v. Wainwright* (1986), 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144.

{¶ 102} In general, prosecutors enjoy a wide degree of latitude during opening and closing arguments. *State v. Whitfield*, Montgomery App. No. 22432, 2009-Ohio-293, at ¶12. They may freely address what the evidence has shown and what reasonable inferences may be drawn from that evidence. *State v. Lott* (1990), 51 Ohio St.3d 160, 165; *State v. Black*, 181 Ohio App.3d 821, 2009-Ohio-1629, at ¶33. "However, prosecutors must refrain from making misleading insinuations and assertions as well as expressing personal beliefs or opinions regarding the defendant's guilt. Prosecutors must also refrain from alluding to matters unsupported by admissible evidence. 'It is a prosecutor's duty in closing arguments to avoid efforts to obtain a conviction by going beyond the evidence which is before the jury.'" (Citations omitted.) *State v. Richmond*, Greene App. No. 2005 CA 105, 2006-Ohio-4518, at ¶15, quoting *State v. Smith* (1984), 14 Ohio St.3d 13, 14.

{¶ 103} At the outset, we note that the trial court repeatedly advised the jury that closing arguments are not evidence and are merely the attorneys' interpretation of the evidence. The court further instructed the jury to consider only the evidence and to disregard answers that were stricken and exhibits that were referred to during trial but not admitted into evidence. We presume the jury followed the court's instructions.

{¶ 104} First, Green asserts that his counsel should have objected to the prosecutor's comments that Green challenged Deaton and May to "figure it out

instead of telling them what happened" and that "he's given [the challenge] to you all." Green asserts that these statements constituted improper commentary on Green's constitutional right not to testify.

{¶ 105} It is well-established that prosecutors may not comment on a defendant's exercise of his right not to testify at trial. *State v. Fears* (1999), 86 Ohio St.3d 329, 336, citing *Griffin v. California* (1965), 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106. In determining whether the prosecutor's comments constitute improper commentary on a defendant's failure to testify, the question is "whether the language used was *manifestly* intended or was of such character that the jury would naturally and *necessarily* take it to be a comment on the failure of the accused to testify." (Emphasis sic) *State v. Webb*, 70 Ohio St.3d 325, 328, 1994-Ohio-425, quoting *Knowles v. United States* (C.A.10, 1955), 224 F.2d 168, 170.

{¶ 106} In our view, the prosecutor's statement that Green had challenged the detectives to figure out what had happened, instead of telling them, was a reasonable comment on May's testimony that Green had told the detectives that he knew who was last with Banks and who had killed him, but he would not tell the officers. Although the prosecutor's next statement that Green had now given that challenge to the jury may have reminded the jury that Green did not testify, it could also reasonably be interpreted as a comment that the defense had challenged the jury to determine whether he had committed the offenses or whether there was a viable alternative suspect who may have committed the offenses. The prosecutor's statements were not necessarily a comment on Green's failure to

testify. The prosecutor's statements did not amount to misconduct, and Green's counsel did not render ineffective assistance by failing to object to them.

{¶ 107} Second, Green asserts that the prosecutor told the jury that Banks was going to be involved in a drug deal and that he was double-crossed, despite the fact that there was no evidence to support these statements. At trial, May related statements made by Green during the July 27, 2004, interview. Green had told May that he was with Banks on February 6 "starting at noon that day and throughout the day, assisting him in getting money from various people, various locations to pay off the $11,800 in debt that he [owed] for the drugs." Green related that they had ended the evening at Banks' home on Cindy Drive and that a group of other people were there. Green would not say who these other people were. When asked why someone would trust Banks with drugs if he would not pay for other drugs, Green responded, "that's what we were led to believe, that they would forgive him and give other drugs." May further testified:

Q: "Did you ask the Defendant whether or not John Banks had been in duress when he died?

A: "Yes, sir, I did.

Q: "How did that come about?

A: "I posed the question that hypothetically if you were at the stables and walking down the path, I asked him if he thought John Banks was under duress.

Q: "And what did the Defendant say?

A: "He said he did not believe he was under duress and stated that he

was tricked the whole evening.

Q: "Did he ever explain to you how he could know such a fact without being at the stables?

A: "No, he didn't.

Q: "And how had Mr. Banks been tricked all day? Did he describe how he had been tricked all day?

A: "No, sir."

{¶ 108} Sergeant Burling also testified about his conversation with Green. Burling stated that Green had not talked about people being at Banks' house to do a drug deal.

{¶ 109} Although there was no direct evidence that individuals were at Banks' home on February 6, 2004, in order to conduct a drug transaction or that Banks was tricked that night, such conclusions could be reasonably inferred from the evidence. Banks had been collecting money to pay off his drug debt, Green was unwilling to identify the individuals to whom the debt was owed or the people in the house, and he responded to May's hypothetical question by suggesting that Banks was tricked. Green had told May that "we" were led to believe that Banks would be forgiven and given other drugs. One of Green's recorded conversations with Shumway, albeit vague, referred to an apparent drug transaction and "what happened down there." The prosecutor's statements were reasonable inferences based on the evidence.

{¶ 110} Moreover, defense counsel addressed the State's drug deal argument in his own closing argument. He asserted that the jury did not "hear

anything at all about trying to do a drug deal with [Shumway] and Roger Shawn Green." Counsel stated: "I don't know who's going to supply the drugs or who's going to supply the money, but there's no evidence of that." Defense counsel could have reasonably chosen to respond to the State's argument in his own argument rather than objecting during the State's closing argument and, if so, this was a reasonable trial strategy decision.

{¶ 111} Third, Green claims that his counsel should have objected to the prosecutor's statements that Green and Shumway were broke. He argues: "The most the State proved was that Kim had less than $1,500 on February 6 and that Kim and Mr. Green spent $593.30 and some unknown amount on a television in the next week or so. This is not evidence that Mr. Green and Kim had $0.00 on February 6 ***."

{¶ 112} In their case-in-chief, the State presented evidence that Shumway and Green were both unemployed, that Shumway had received approximately $1,300 from Delco in late 2003, and that Shumway spent thousands of dollars rapidly due to her drug habit. Lykins and Martin indicated that Shumway borrowed money from her father regularly to pay living expenses. Hay testified on Green's behalf that she paid for his truck, purchased his clothes, and supplied money for his expenses. Again, the State's statements during closing argument that Shumway and Green were "broke" were reasonable commentary on the evidence, and Green's counsel did not err in failing to object.

{¶ 113} Next, Green asserts that the State repeatedly misstated the evidence when they argued that Banks had a "large sum of cash" and "thousands

of dollars." As detailed above, several witnesses testified that, shortly before he disappeared, Banks was collecting money and had a "wad" of cash. Clemons believed that cash was several thousand dollars. Green admitted to detectives that he was with Banks on February 6, assisting him in collecting money, and that Banks kept the money in his pocket. Again, the State's argument was a reasonable interpretation of the evidence.

{¶ 114} Fifth, Green complains that the prosecutor repeatedly argued that Banks had been killed on February 7, despite the fact that the direct evidence established only that he was last with Green around midnight on February 7 and he was found dead on February 19. Although there was no direct evidence of a more specific time of death, the prosecutor – and the jury – could have reasonably inferred, upon viewing the evidence as a whole, that Banks was killed shortly after he was last with Green. The prosecutor's statement that Banks had died on February 7 was proper argument.

{¶ 115} Sixth, Green argues that the prosecutor improperly attempted to refute Green's statement that he did not know where Centerville High School was located by stating: "He [Green] lives in Waynesville, had played football apparently with Brian Martin in West Carrollton, had family and in-laws who live in West Carrollton, but he doesn't know where Centerville High School is."

{¶ 116} At trial, Martin testified that he went to junior high school with Green, and that he (Martin) graduated from West Carrollton High School. Although the prosecutor's argument misstated the relationship between Green and Martin, we fail to see how the prosecutor's statements prejudiced Green. The

prosecutor's primary assertion regarding the high school was that Centerville High School is located on State Route 725, a major thoroughfare. The prosecutor's reference to information outside of the record concerning Green's association with West Carrollton had minimal significance to the outcome of this case.

{¶ 117} Seventh, Green claims that his counsel should have objected to the prosecutor's statement during rebuttal closing argument that it "looked like [the Carhartt coat] fit the Defendant pretty well to me on the arms. Drop 30 pounds off the Defendant, it looks like it fit pretty well."

{¶ 118} Although we agree that the prosecutor should have refrained from giving his personal opinion, immediately after that comment, the prosecutor told the jury, "You saw it. That's for you to judge, even if that coat is the Defendant's." The prosecutor thus reminded the jury that it was the province of the jury to determine whether the coat belonged to Green and whether it fit him, regardless of the prosecutor's opinion.

{¶ 119} Moreover, defense counsel had fervently argued that the coat did not fit Green. In his closing argument, defense counsel told the jury that, "when you watch that BP tape later, you're going to see a coat that's down below his waist, you're going to see long sleeves, and you're going to see a fit that's roomy. And the other day when Detective Deaton was testifying, I know that you saw that coat up his back, short sleeves. You know, when you get fatter, you don't get taller. Your arms don't grow. But today, still today, they insist that's it, that's the jacket." At the conclusion of the defense counsel's closing argument, Green put on both coats again for the jury and counsel asked the jurors "to note the length

of the coat, the breadth of the coat and the sleeves of the coat" and "to compare that to the coat in the video."

{¶ 120} Although the prosecutor should not have given his own opinion of the coat's fit and defense counsel could have chosen to object to that comment, we find no basis to conclude, upon reviewing the trial as a whole, that the prosecutor's comment affected any substantial rights or resulted in an unfair trial. Accordingly, we cannot conclude that defense counsel rendered ineffective assistance when he failed to object to the prosecutor's statement.

{¶ 121} Next, Green asserts that his counsel should have objected to the prosecutor's alleged misstatements regarding Green's possession of a Star 9 mm gun. During closing argument, the prosecutor stated that Green had told May that he possessed an S gun with an extended clip.

{¶ 122} In his testimony, May stated that Green admitted to purchasing a gun from Snyder after Banks' death. Green described the weapon as beginning with an S and having an extended clip. Green told May that he returned the gun to Snyder a few days later. Snyder later testified that he had a conversation with Green about a problem Green was having with a Star 9 mm gun; Green had complained that the clip would not stay in the gun. Snyder further testified that he spoke with Green about Green borrowing a Taurus 9 mm gun after Green had returned from his honeymoon. Although the prosecutor emphasized Green's admission to May that he had had an "S" gun with an extended clip, the jury could have reasonably concluded from the evidence – and the prosecutor could have reasonably argued – that Green had the Star 9 mm before Banks' death. We find

no fault with the prosecutor's argument, and defense counsel had no basis to object to the prosecutor's statements.

{¶ 123} Ninth, Green asserts that his counsel erred in failing to ensure that the jury heard the court sustain an objection to the prosecutor's rebuttal closing argument and in failing to object again as the prosecutor continued the same line of argument. The prosecutor's argument referred to a telephone conversation between Green and Shumway during which Shumway stated that she "don't make up nothing. I don't set and make up lies like having five and half pounds of it or grams of it or whatever it was ***." Shumway accused Green of lying to her. Green told Shumway that "he [a third person] was trying to get not that much, but he was trying to give us like one and half, two, when all of it was said and done. *** But see I didn't want none of it so I couldn't – I just wanted it all to stop. But it did though, didn't it."

{¶ 124} In his rebuttal argument, the prosecutor told the jury that "the evidence shows that the one and a half to two the Defendant is referring to is that Johnny, who thought he was there to do a drug deal, to give money for drugs, the Defendant said that, the Defendant is saying to Kim and explaining what happened because the evidence shows Kimberly wasn't down there. She may have been on the scene on top of that parking lot. And we'll look at the evidence in a minute. She wasn't down there when the shooting occurred so he's telling her what happened and he's saying that he, Johnny, tried to give us one and a half. That's 15,000 to $2,000."

{¶ 125} Defense counsel objected to the prosecutor's argument on the

ground that there was "no evidence that that interpretation can or should be made." During a sidebar discussion, defense counsel asserted that there was no evidence that "one and a half to two" referred to thousands of dollars. The court also questioned whether the State could argue that the conversation referred to Banks, stating to the prosecutor "How come you say Johnny Banks one and half to two something? You don't even know. You got two parties who you don't know." The court sustained the objection, and the prosecutor indicated that he would "leave out the currency part" and play the tape recording of the conversation. After the sidebar had concluded, the court did not reiterate its ruling for the jury, and defense counsel did not request the court to do so.

{¶ 126} Upon resuming his argument, the prosecutor told the jury:

{¶ 127} "What you'll hear on the tape is that the Defendant says to Kimberly – is discussing what happened down there, and you'll hear it, the word down there. The Defendant said that he was trying to give us one and a half, give us one and a half to two. That's what you're going to hear on the tape. You're going to hear the Defendant explain this to Kim, telling her about what happened down there, the circumstance surrounding it. Okay?

{¶ 128} "Now, admittedly – let me be clear, admittedly that statement by itself may have more than one interpretation if you look at it in the isolated form, until you put it into context, which we're about to do in a second. ***

{¶ 129} "The State's position, Ladies and Gentlemen, is that they're talking about a drug transaction that was to occur down there. The State's position is that this is direct corroboration what the Defendant, frankly, told Officer May and

Sergeant Deaton when he said that Johnny was set up. There was supposed to be a drug deal that was going to take place that was actually a robbery.

{¶ 130} "The Defendant admits – admitted the five and a half grams was not there; but then he goes on to say again, but he was trying to give us one and a half to two. When he says one and a half to two, they don't say grams. They're not talking about grams there, drugs. ***"

{¶ 131} At the outset, we agree with Green that his counsel should have ensured that the jury was informed of the trial court's ruling on his objection to the prosecutor's argument. As far as the jury knew, defense counsel had objected to the prosecutor's statement that "one and a half to two" referred to thousands of dollars and, after an unheard discussion, the prosecutor continued his rebuttal argument without a known ruling from the court. The jury was left to speculate whether the prosecutor's argument was proper and may have inferred, from the lack of an instruction from the court, that the prosecutor was making an appropriate argument.

{¶ 132} However, we find no basis to conclude that Green was prejudiced by his counsel's failure to request a ruling in open court or to object to the prosecutor's rebuttal argument after the bench conference concluded. The prosecutor made clear to the jury that several interpretations of the telephone conversation were possible and that it was the State's position that Shumway and Green were referring to an anticipated drug transaction involving Banks. As stated above, the jury was instructed on several occasions that the arguments of counsel were not evidence, and that the jury was to consider only the evidence in their

deliberations. Green has not established that his counsel was ineffective in failing to object to the prosecutor's argument.

{¶ 133} Tenth, Green asserts that, during his closing argument, the prosecutor improperly vouched for two of the State's witnesses, Lykins and Snyder, and improperly commented on Green's guilt.

{¶ 134} "When making a closing argument, a prosecutor should not express his personal belief or opinion on the credibility of a witness or regarding the guilt of the defendant or allude to matters which are not supported by admissible evidence. *** [A]lthough a prosecutor may not give his personal opinion about the credibility of witnesses, the prosecutor may comment fairly on the credibility of witnesses based on their in-court testimony, or may even suggest to a jury that the evidence demonstrated that the witness was lying." (Citations omitted.) *State v. Jones*, Montgomery App. No. 18789, 2002-Ohio-1780.

{¶ 135} During his rebuttal argument, the prosecutor commented that Jimmy Lykins "seemed to me – you can judge his credibility – a nice person. I didn't see anything negative about him." Lykins' testimony indicated that he was retired from General Motors, had been married for 41 years, was raising Green's and Shumway's daughter, and would provide money to Shumway for her bills. We find no error in the prosecutor commenting that Lykins was likeable, in the absence of any assertion regarding his credibility.

{¶ 136} The prosecutor's comments concerning Snyder were more directly related to his credibility. In his closing argument, the prosecutor emphasized that Snyder had repeatedly answered the questions asked of him by

Deaton and May and had turned over the Taurus handgun to the officers. During rebuttal, the prosecutor stated:

{¶ 137} "Then you also have Jeramiah Snyder. Jeramiah Snyder came out. The State did call Jeramiah, brought him here from Kansas. You know that already. We brought him here from Kansas so he could testify to you all. Jeramiah Snyder came voluntarily. Just like each and every time he's ever been asked to come and submit to anything, he did it. He submitted to oral question after oral question after oral question and answered each and every one.

{¶ 138} "One of the tests you use for credibility, you're going to hear this from the judge, is one's candor as you heard them from the witness stand, their openness, frankness or lack of it. Jeramiah was the honest person. He told you all his wars. He didn't hide anything that he had done. He told you. He even corrected himself to back up how long he was selling drugs. Until January, I think it was, 2005. He first said I think earlier he cut off, but he backed up. He's telling you all his wars. He's not hiding anything. Jeremiah all the way down the line has cooperated at each and every step and been truthful at each and every step with the officers."

{¶ 139} At this juncture, defense counsel objected, and the prosecutor withdrew his comment. The prosecutor then continued:

{¶ 140} "He's been open with each and every Officer when they've asked him to come in and interview, and he's done that. But with that said, let me make it clear, Ladies and Gentlemen, you don't have to believe Jeramiah. That's your job. If you go back there and you decide you don't want to believe him, that's

within your purview, as it is with each and every one. Let me make that clear. With each and every witness, that's your decision and your decision alone."

{¶ 141} Although the prosecutor made a brief reference to Snyder being "honest," he supported that assertion with the evidence that Snyder had repeatedly given statements to the police and turned over the Taurus handgun. In addition, Snyder had admitted to his involvement in the drug trade at trial. Significantly, the prosecutor withdrew a second statement that Snyder was "truthful" and emphasized to the jury that they had the responsibility to determine Snyder's credibility and they could disbelieve Snyder if they so chose. Upon review of the record as a whole, we find no prejudice to Green based on the prosecutor's comments, and no ineffective assistance of counsel in defense counsel's failure to make additional objections.

{¶ 142} Green asserts that the prosecutor improperly rendered an opinion on his guilt when he stated, "Ladies and Gentlemen, the bottom line of it is that this case is a case where we, the State, the Police, and now the Jury, you Jurors, have to work to figure it out. It's not easy. It wasn't easy. This is a – because you're dealing with the drug world; we're just not familiar with it, frankly, but we've had to get it and work hard to work up evidence to present to you, and we've laid out the case that we have." We do not perceive the prosecutor's comment as an improper opinion on Green's guilt. Accordingly, counsel was not ineffective in failing to object.

{¶ 143} Eleventh, Green contends that the prosecutor improperly appealed to the emotions of the jury when he argued that Banks "didn't deserve to

be murdered in a cold cowardly way," that some witnesses had said "some fairly decent things about [Banks] despite his drug issue," and that "nothing that you're going to do is going to bring Johnny back." Green notes that several attempts by witnesses to state "nice things" about Banks had been stricken and the prosecutor's argument in that respect thus was factually incorrect.

{¶ 144} Although the cited statements about Banks may have been overly dramatic, the remarks were very brief and the bulk of the prosecutor's arguments were based on the evidence introduced at trial. The prosecutor did not excessively appeal to the jury's emotions, and his argument did not result in an unfair trial.

{¶ 145} Twelfth, Green claims that his counsel should have objected to the prosecutor's argument that Green repeatedly refused to tell the police who had killed Banks. Green states that there is no evidence that the police repeatedly asked Green who the killer was. In his testimony, May related that Green would not answer who had killed Banks, even though he knew "without a doubt" who had committed the offense. May also stated that Green indicated that he knew who was last with Banks, but Green would not say. The critical aspect of this testimony is that Green expressed that he knew who had caused Banks' death but he would not tell the police. The fairness of Green's trial was not affected by the prosecutor's use of the word "repeatedly."

{¶ 146} Next, Green complains that the prosecutors improperly argued that Green had given inconsistent statements about being at the BP station when the evidence did not demonstrate that the statements were inconsistent.

{¶ 147} At trial, Sergeant Burling testified that Green informed him that he had been at Banks' home from 9:00 p.m. to 10 p.m. on February 6, 2004, and that he "soon changed it to 9:00 p.m. to 11:00 p.m." Green told Burling that the two men left the house at the same time but separately and stopped at a gas station. Green indicated that they left the gas station separately, because one of them had to go see someone else. In contrast, May testified that Green told him that he knew his "time line was off" and he "wanted to make it at a later time." Green told May that, after he and Banks left Banks' home separately, Green went to the gas station to buy rolling papers. Banks drove by after Green left the store and saw that he (Green) was locked out of his truck. Green stated that Banks assisted him in gaining access to his truck so he could leave. The prosecutors' arguments that Green had given inconsistent statements were reasonably based on the evidence presented at trial.

{¶ 148} Green also argues that his counsel should have objected to the prosecutor's argument that there was ballistic evidence tying Green to the crime scene. Despite Green's assertion, the prosecutor's argument was reasonable based on the facts that Green had possessed a gun that could have shot the fatal HydroShok bullets, a HydroShok bullet was found in the Waynesville apartment, and there was evidence that the bunter marks on the cartridges found at the scene and at the Waynesville apartment matched.

{¶ 149} Moreover, although defense counsel did not object during the State's closing argument, counsel discussed in his own closing argument that Monturo, the State's expert, could not match the bullets. Defense counsel went on

to argue that the bunter mark identifications are "kind of an imprecise science," and he thoroughly critiqued Monturo's bunter mark comparison of the casings in this case. Counsel acted reasonably in addressing the ballistic evidence in his closing argument rather than objecting to the State's arguments.

{¶ 150} Finally, Green asserts that his counsel should have objected to various statements by the prosecutors that allegedly shifted the burden of proof onto Green. In particular, Green complains that the prosecutor argued that Green was the last to see Banks alive, that there were no viable alternative suspects, that there was no evidence of anyone wanting to kill Banks, and that Green refused to tell the police what had happened.

{¶ 151} It is well-established that "the state may comment upon a defendant's failure to offer evidence in support of its case." *State v. Collins* (2000), 89 Ohio St.3d 524, 527. "Such comments do not imply that the burden of proof has shifted to the defense, nor do they necessarily constitute a penalty on the defendant's exercise of his Fifth Amendment right to remain silent." Id. at 527-528. Furthermore, "the prosecutor is not precluded from challenging the weight of the evidence offered in support of an exculpatory theory presented by the defense." Id. at 528.

{¶ 152} With that standard in mind, we find no misconduct in the prosecutor's arguments. The prosecutor's statements were supported by the evidence, constituted circumstantial evidence of Green's guilt, and merely commented on the lack of evidence that a drug dealer had killed Banks, as Green's counsel had argued. None of the statements implied that the burden of proof

should shift to Green. See *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, at ¶260. We note, additionally, that the prosecutor reminded the jury during its rebuttal argument that the State bore the burden of proof, and the trial court instructed the jury regarding Green's presumption of innocence and the State's burden to establish Green's guilt beyond a reasonable doubt. Defense counsel was not ineffective in failing to object to the prosecutor's arguments.

C. *Failure to Object to Crim.R. 16(B)(1)(g) Procedure*

{¶ 153} Green further claims that his trial counsel should have objected to the trial court's failure to allow defense counsel to review Sherry Thies' prior statement before cross-examination, in accordance with Crim.R. 16(B)(1)(g).

{¶ 154} Under Crim.R. 16(B)(1)(g), defense counsel may request, upon completion of a witness's direct examination at trial, the court to "conduct an in camera inspection of the witness's written or recorded statement with the defense attorney and prosecuting attorney present and participating, to determine the existence of inconsistencies, if any, between the testimony of such witness and the prior statement." "Under the rule, counsel for both parties 'must be given the opportunity to: (1) inspect the statement personally; and (2) call to the court's attention any perceived inconsistencies between the testimony of the witness and the prior statement.'" *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, at ¶94, quoting *State v. Daniels* (1982), 1 Ohio St.3d 69, syllabus.

{¶ 155} If the court determines that inconsistencies exist, the witness's prior statement is given to defense counsel for use during cross-examination. Crim.R. 16(B)(1)(g). Conversely, if the court determines that no inconsistencies

exist, the prior statement is not given to defense counsel. Id.

{¶ 156} Pursuant to Crim.R. 16(B)(1)(g), Green's defense counsel requested an in camera review of several of the State's witnesses' prior statements, including the statements of Darin Chapman and Sherry Thies, prior to cross-examination. When defense counsel requested the prior statements for Chapman, the State's first witness, the trial court responded, "Pursuant to the rule I don't believe the statement is inconsistent with his testimony and, therefore, it will not be turned over to the Defense." At the conclusion of the State's direct questioning of Thies, defense counsel asked to approach, and the prosecutor apparently handed the court Thies' prior statement. The court indicated that it did not "see anything contradictory in this statement pursuant to the rule," and he asked "Does Counsel wish to point something out that I may have missed? I don't see it." The prosecutor replied, "No." The court then instructed defense counsel to proceed. The record does not reflect whether defense counsel had an opportunity to review the statement prior to the court's ruling.

{¶ 157} Assuming, as Green argues, that defense counsel was denied an opportunity to participate in the review, defense counsel should have objected to the procedure employed by the court or requested an opportunity to review the prior statements. See *Hale* at ¶96, citing *State v. Cunningham*, 105 Ohio St.3d 197, 2004-Ohio-7007, at ¶48. Instead, counsel proceeded to cross-examine Thies without the benefit of her prior statement.

{¶ 158} On appeal, Green claims that he was prejudiced by his counsel's conduct, because Thies' prior statement was inconsistent with her

testimony in several respects. He notes that Thies stated to police that Green and Shumway returned at approximately 3:00 to 3:30 a.m. on February 15, 2004, whereas she testified at trial that she saw them on February 17 or 18. Thies had also told police that, at approximately 8:00 to 8:30 a.m. on February 18, 2004, she videotaped a man entering Shumway and Green's apartment, and that she had last seen Green at the apartment on February 17, 2004. Green also emphasizes that Thies reported in her prior statement that Jimmy Lykins had called her on February 11, 2004, to say that Shumway had called her parents from Tennessee and had told them that she would be back in three or four days. Finally, Green notes that Thies had testified at the suppression hearing that she had entered the apartment on March 13 through an unlocked door; at trial, she indicated that she may have had to take the screen off of a window to get in, but she was not sure.

{¶ 159} We disagree that Green was prejudiced by his counsel's alleged failure to object to the court's denial of his right to review Thies' prior statements. Although Thies told the police that she had observed a man entering Green and Shumway's apartment on February 18, 2004, and that she had spoken with Shumway's father, these prior statements were additional to, not inconsistent with, her trial testimony. The fact that a witness's prior statement or trial testimony contains additional details does not mean that inconsistencies exist for purposes of Crim.R. 16(B)(1)(g). See *Cunningham* at ¶49. Moreover, Lykins' statement to Thies would have been hearsay and, therefore, inadmissible. As to Thies' testimony that she saw Shumway and Green "the next week *** probably around the 17th, 18th of February," we do not find this discrepancy with her prior statement

to be material. Finally, defense counsel was aware of Thies' testimony at the suppression hearing, and he did not need to review her prior statement to the police in order to question her about her entry into the apartment on March 13 if he thought this was relevant. Accordingly, Green has not established that his counsel was ineffective.

D. *Lie Detector Reference*

{¶ 160} Green next argues that his counsel rendered ineffective assistance when he failed to ensure that the trial court instructed the jury to disregard a reference to a lie detector test.

{¶ 161} Prior to the resumption of trial on November 10, 2006, defense counsel informed the court that one of the recorded telephone conversations between Green and Hay included a statement by Hay that Greene County detectives had called Shumway and asked her (Shumway) to take a lie detector test but Shumway would not do it. The court told counsel that he would give an instruction to the jury that lie detector tests are not part of the case, they should disregard any comments regarding it, and the witness would not be testifying in this case. The tapes were played later that day as part of Deaton's testimony. The court did not give the instruction to the jury regarding the reference to a lie detector test.

{¶ 162} We agree with Green that his counsel had the right to remind the court to instruct the jury not to consider the reference to the lie detector test after the court failed to do so. Perhaps, as trial strategy, he thought this would remind the jury of the comment and not be beneficial to his client. Regardless, we

cannot conclude that there is a reasonable probability that the outcome of the trial court would have been different had the jury been so instructed. As noted by the State, Green's argument is based on a statement that Shumway – not Green – had refused to take a lie detector test. Shumway did not testify, and her truthfulness was not at issue at trial. We find no basis to conclude that the reference to the lie detector test significantly affected the outcome of Green's trial.

E. *Failure to Object to Portions of the Recorded Telephone Conversations*

{¶ 163} As discussed above, the prosecutor presented excerpts of four recorded telephone conversations, two of which involved Green and Shumway and two of which involved Green and Hay. Green asserts that his counsel was ineffective in failing to object to the admission of portions of these conversations and in failing to object to the prosecutor's references to statements made by Shumway and Hay in those recordings during closing argument.

{¶ 164} First, Green contends that counsel should have objected to the admission of statements by Shumway that Green was a "motherfucker," was untrustworthy, had lied to her, and had done "bad things" to her all of her life. Green asserts that these statements violated Evid.R. 403(A), and that any probative value was substantially outweighed by the danger of unfair prejudice.

{¶ 165} Green correctly states that defense counsel did not object to the recordings prior to the telephone conversations being played for the jury. Counsel had filed a motion in limine to exclude the telephone recordings and had objected to the admission of these exhibits at the conclusion of the State's case-in-chief. The tapes were admitted over counsel's objection. In our view,

although counsel's objection to the admission of the telephone conversations may have been sufficient to preserve the error for appellate review, counsel should have objected to the telephone recordings prior to the recordings being played for the jury. Nevertheless, we cannot conclude that Green was prejudiced by the admission of the telephone conversations, because we find no abuse of discretion in the trial court's determination to admit that evidence.

{¶ 166} In general, relevant evidence is admissible unless its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury. Evid.R. 402; Evid.R. 403(A). The decision whether to admit evidence is left to the sound discretion of the trial court, and a reviewing court will not reverse that decision absent an abuse of discretion. *State v. Sage* (1987), 31 Ohio St.3d 173, paragraph two of the syllabus. An abuse of discretion means more than a mere error of law or an error in judgment. It implies an arbitrary, unreasonable, unconscionable attitude on the part of the trial court. *State v. Adams* (1980), 62 Ohio St.2d 151.

{¶ 167} The telephone conversations between Shumway and Green were relevant to demonstrate that Green had engaged in criminal activity, that an anticipated drug deal was to have occurred "down there," and that Green had discussed what had happened with Shumway. In conversations with Hay, Green had told his sister, while referencing the events in Greene County, to be "as sweet as possible" to Shumway, that he "needed her," that "if she don't never say anything, nothing can happen," and that what Shumway told Hay was true. Heard together, the recordings created a inference that Green was involved in the murder

of Banks in Greene County. Although Shumway's statements were far from flattering to Green, the trial court did not abuse its discretion when it determined that the probative value of the statements outweighed their prejudicial nature.

{¶ 168} Second, Green asserts that his counsel was ineffective in failing to object to the prosecutor's references to statements by Shumway and Hay from the telephone recordings as substantive evidence during closing argument. In his closing, the prosecutor cited to statements that Shumway did not trust Green and statements by Hay regarding Shumway's behavior. Because the telephone conversations were admitted into evidence, the prosecutor was free to repeat and comment on the content of those conversations. We find no error in trial counsel's failure to object to the prosecutor's argument.

F. *Defense Counsel's Statements regarding Bunter Tools*

{¶ 169} Green asserts that his counsel rendered ineffective assistance when he stated during his closing argument that a bunter tool averages "a hundred, hundred and 20, a hundred 50 rounds per bunter." Mike Larsen, a product service representative for Federal Cartridge Company, testified that a bunter tool could make approximately 120,000 to 150,000 cartridge casings. Dehus also reiterated that an average of 100,000 to 120,000 casings could be produced by a single bunter tool. Green's counsel's reference to 100, 120, or 150 was clearly a misstatement, and it is likely that the jury understood that counsel was talking in "thousands," consistent with the testimony. We find no reasonable probability that the outcome of Green's trial was affected by counsel's failure to include "thousand" in his argument regarding the lifespan of a bunter tool.

G. *Cumulative Error*

{¶ 170} Finally, Green argues that the cumulative weight of his counsel's errors denied him a fair trial. As discussed above, Green's trial was not without error. However, none of the errors that we have identified were prejudicial to him. Although the Supreme Court of Ohio has stated that numerous harmless errors may cumulatively deprive a defendant of a fair trial and thus may warrant the reversal of his conviction, *State v. DeMarco* (1987), 31 Ohio St.3d 191, paragraph two of the syllabus, upon a complete review of the record, we cannot conclude that prejudicial error occurred in this case.

{¶ 171} Green's third assignment of error is overruled.

V.

{¶ 172} Green's fourth assignment of error reads:

{¶ 173} "THE TRIAL COURT ERRED WHEN IT ADMITTED THE JACKETS INTO EVIDENCE OVER OBJECTION."

{¶ 174} In his fourth assignment of error, Green contends that the trial court erred in admitting into evidence the two jackets seized from Shumway's apartment in June 2004, because there was no evidence that either jacket – particularly, the Carhartt coat – belonged to Green. Green argues that the only evidence suggesting that the Carhartt coat belonged to him was Deaton's testimony that he believed that it was same jacket that Green wore in the BP security video. Green notes that a telephone conversation between himself and Hay, recorded prior to the search of Shumway's residence, indicated that Hay had already taken Green's Carhartt coat from Shumway's apartment. In addition, Green tried on the

two coats at trial, which apparently demonstrated that the coats did not fit Green well. (Deaton testified on redirect examination that Green was "probably 20 to 30 pounds heavier" than he was in February 2004.) Green argues that the admission of the coats was prejudicial, because the gunshot residue was located on the coats and he was seen wearing a similar coat when he was with Banks on February 7, 2004.

{¶ 175} At the conclusion of the State's case, defense counsel objected to the admission of the coats into evidence on the ground that the coats had not been "connected" with Green. The prosecutor responded that Green was seen on the BP videotape wearing a jacket and that jacket was retrieved from Shumway's apartment. The prosecutor claimed that this constituted sufficient circumstantial evidence that the coats belonged to Green. The court allowed the coats to be admitted into evidence.

{¶ 176} As stated above, relevant evidence is generally admissible whereas irrelevant evidence is not. Evid.R. 402. While irrelevant evidence must be excluded, the standard for relevancy is easily satisfied. *State v. Huber*, Clark App. No. 07-CA-122, 2009-Ohio-1637, at ¶27 (noting "[t]he relevancy standard is quite low"). "Relevant evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R. 401.

{¶ 177} Although there was evidence from which the jury could have concluded that neither coat belonged to Green, we cannot say that the trial court

abused its discretion in concluding that the BP security video, in conjunction with the coat having been located at Shumway's apartment, provided circumstantial evidence that these were Green's coats and, thus, relevant to whether Green had committed the offenses. At the time the coats were seized, Green and Shumway were married, the coats were seized from Shumway's apartment, and the photos of the closets where the coats were located (which were admitted into evidence) appear to show men's clothing. Green appears on the BP videotape wearing a coat that appeared to be the same as the Carhartt coat seized by the police. Accordingly, the court could have reasonably determined that there was sufficient evidence that the coats – particularly, the Carhartt coat – was Green's.

{¶ 178} The fourth assignment of error is overruled.

VI.

{¶ 179} Green's fifth assignment of error states:

{¶ 180} "THE TRIAL COURT ERRED BY FAILING TO GRANT MR. GREEN'S MOTION FOR A MISTRIAL WHEN A WITNESS FOR THE STATE TOLD THE JURY IN RESPONSE TO DIRECT EXAMINATION THAT MR. GREEN HAD BEEN TO PRISON."

{¶ 181} In his fifth assignment of error, Green claims that the trial court erred in failing to grant his motion for a mistrial after one of the State's witnesses, Jeramiah Snyder, testified that he "was told that [Green] was released from prison." Green asserts that the information that Green had been to prison was prejudicial, considering that the State's cases against him was not overwhelming and the State could have prevented the reference to prison.

{¶ 182} A mistrial should only be declared when a fair trial is no longer possible. *State v. Franklin* (1991), 62 Ohio St.3d 118, 127; *State v. Engle*, Montgomery App. No. 22934, 2009-Ohio-4787, at ¶35. "The decision whether to grant a mistrial lies within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *State v. Brown*, 100 Ohio St.3d 51, 2003-Ohio-5059." *State v. Williams*, Montgomery App. No. 22126, 2008-Ohio-2069, at ¶30.

{¶ 183} At the beginning of Snyder's testimony, the State asked Snyder how he had met Green. Snyder began his response, saying, "I was told that he was – he was released from prison –." Defense counsel immediately objected and asked to approach the bench. Defense counsel then asked the court for a mistrial.

{¶ 184} During the bench conference, the prosecutor told the court:

{¶ 185} "The State has instructed this witness numerous times in trial prep and the latest last night, please, do not mention the Defendant's criminal history or the fact he's been in prison. He just slipped and was talking about how he met him. I'm not sure the Jury picked it up. I would ask that the limine instruction be given and let me tell the witness to please don't mention that again."

{¶ 186} The court indicated that it would sustain the objection, instruct the jury to disregard Snyder's last response, and allow the prosecutor to "take a moment to whisper it into his ear – don't say it anymore." The judge further stated to the attorneys that he would hold Snyder in contempt, send him "straight to jail", and "move for" (and, presumably, grant) a mistrial if there were further references to Green's prior criminal history. Upon the conclusion of the sidebar, the court told

the jury: "The Court will sustain the objection and the answer is stricken. The Jury will disregard the response the witness gave. Ask your next question."

{¶ 187} There were no further references to Green's prior criminal history or to Green's having been in prison.

{¶ 188} The trial court did not abuse its discretion in denying Green's motion for a mistrial. The court immediately struck the answer and instructed the jury not to consider Snyder's response. We presume the jury followed that instruction. The phrasing of the State's question did not solicit Snyder's improper response; Snyder could have simply answered, as he later did, that he had met Green through Shumway. Nor is there any evidence that the State intended to elicit information about Green's prior criminal conduct from Snyder. To the contrary, the prosecutor represented to the court that he had repeatedly instructed Snyder not to mention Green's criminal history. Snyder's reference to Green's having been in prison was an isolated statement after several days of testimony. Upon review of the record, we find no basis to conclude that Snyder's response denied Green a fair trial.

{¶ 189} Green's fifth assignment of error is overruled.

VII.

{¶ 190} Green's sixth assignment of error states:

{¶ 191} "THE TRIAL COURT ERRED BY ALLOWING THE STATE'S EXPERT TO TESTIFY ABOUT BUNTER MARKS."

{¶ 192} In his sixth assignment of error, Green contends that the trial court erred in allowing the State's firearm and tool mark examiner, Chris Monturo,

to testify about the bunter marks on the cartridge casings found at Sugarcreek Riding Center and on the bullet retrieved from the Waynesville apartment. The State used that testimony to associate the casings found at the crime scene with the bullet found at the apartment.

{¶ 193} On September 15, 2006, prior to trial, Green requested a hearing, pursuant to Evid.R. 104, on the admissibility of expert testimony regarding bunter mark identification, among other things. Citing *State v. Engle*, Fairfield App. No. 03-CA-84, 2005-Ohio-276, the court denied the request, noting that "bunter tool marks on casings have been subject to expert testimony in Ohio criminal cases, including attempted murder." At trial, defense counsel conducted a voir dire examination of Monturo on whether he was qualified to testify regarding bunter mark identifications, and they moved to disqualify Monturo from providing expert testimony on that subject. Defense counsel also objected to Monturo's testimony that the bunter marks on all eight fired cartridges and the unfired cartridge were made by the same bunter tool. The court allowed Monturo to testify regarding the bunter marks over defense counsel's objection.

{¶ 194} The admissibility of expert testimony is governed by Evid.R. 702. Under that rule, a witness may testify as an expert when "(A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons; (B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony; [and] (C) The witness' testimony is based on reliable scientific, technical, or other specialized

information." Stated simply, expert testimony "must be needed, the proposed expert must be qualified as an expert on the pertinent subject matter, and, even if qualified, the particular testimony must be based on 'reliable' information." *State v. Rosas*, Montgomery App. No. 22424, 2009-Ohio-1404, at ¶34.

{¶ 195} "[T]he test of admissibility is whether a particular witness offered as an expert will aid the trier of fact in the search of the truth." *Ishler v. Miller* (1978), 56 Ohio St.2d 447, 453. Whether a witness is qualified to testify as an expert is a matter for the court to determine pursuant to Evid.R. 104(A). *Bedard v. Gardner*, Montgomery App. No. 20430, 2005-Ohio-4196, at ¶58. The admissibility of expert testimony is a matter left to the discretion of the trial court, and the court's determination will not be reversed absent an abuse of discretion. *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, at ¶114.

{¶ 196} Green asserts that Monturo's testimony regarding the identification of bunter marks was not reliable. He states: "The trial judge erred in allowing this testimony because the State failed to establish that the identification of bunter marks had been tested, had been subjected to peer review, had a known or potential rate of error, and had been generally accepted."

{¶ 197} "A trial court must exercise a 'gatekeeping' duty by testing the basis of proffered testimony for reliability. See *Kumho Tire Co., Ltd. v. Carmichael* (1999), 526 U.S. 137, 141, 119 S.Ct. 1167, 143 L.Ed.2d 238. As division (C) suggests, the issue for the trial court is not whether the testimony is correct but whether the underlying data, methods, and processes are such that they can be trusted to generate reliable information.

{¶ 198} "The criteria that a trial court should use to test reliability depends on the nature of the testimony. In the well-known case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993), 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469, the U.S. Supreme Court developed four factors to help test the reliability of testimony based on scientific information. A few years later, in *Kumho Tire Co., Ltd v. Carmichael*, the Court revisited the issue and clarified that *Daubert's* factors, to the extent they are relevant, may also be used to test expert testimony that is based on 'technical' and 'other specialized' information. The larger principle, taught the Court, is that, regardless of the expert testimony's epistemological basis, when the issue of reliability is raised, the trial court has the duty to determine whether the testimony has 'a reliable basis in the knowledge and experience of [the relevant] discipline.' Id. at 149 (citation omitted). Sometimes, said the Court, 'the relevant reliability concerns may focus upon personal knowledge or experience' rather than scientific methodology. Id. at 150." *Rosas* at ¶36-37.

{¶ 199} Monturo testified that he has been a firearm and tool mark examiner at the Miami Valley Regional Crime Lab for eleven years, and that he trained under the senior firearm examiner, in accordance with the Association of Firearm and Tool Mark Examiners guidelines. His training included visits to firearm manufacturing plants to view the techniques and processes of manufacturing firearms, visits to ammunition manufacturing plants to view those techniques and processes, visits to other laboratories to work under their firearm examiners, and attending various courses. Monturo attends annual continuing education seminars

and workshops.

{¶ 200} Monturo explained that a tool mark is "a mark on an object when a harder object comes in contact with a softer object." He indicated that tool mark analysis encompasses, for example, items such as doors that have been broken into, cash boxes that have been pried, and chain links or shackles that have been cut by bolt cutters. He stated that the marks that he looks for on bullets and cartridge cases in firearms are likewise the result of softer metals being marked by the harder metal of the gun. Thus, the theory, the equipment, and the process "is all the same in the sense of firearms and tool mark identification." Monturo testified that he conducts tool mark analysis as part of his job. He stated that he has conducted thousands of examinations of firearms and casings.

{¶ 201} With respect to bunter marks specifically, Monturo explained that a bunter mark contains the initials of the manufacturer and the caliber of the bullet, and the information is stamped onto a cartridge casing by a hardened steel tool during the manufacturing process. Monturo testified that a bunter mark is just another example of a tool mark. He stated that he has examined bunter marks in the course of his duties, and that he has done comparisons of bunter marks approximately 200 times. Moreover, he is familiar with the process by which the bunter tool strikes the cartridge casing, and he has observed the process at a Winchester ammunition plant and a Star ammunition plant. Monturo recalled testifying about bunter mark identifications on one prior occasion.

{¶ 202} Monturo testified that he performs proficiency tests in tool marks annually and he reiterated that bunter marks are tool marks, but he had not

been tested on bunter marks specifically. Monturo indicated that he had not had any peer review of his bunter mark identifications, that there are no protocols specifically for bunter mark identifications, and that there are no national standards for bunter mark identifications, and that the comparison is based on his training and experience. Monturo had never given any courses on bunter mark identifications.

{¶ 203} Monturo described his examination of the bullets and cartridges, stating that he used a comparison microscope, which allows him to look at two items simultaneously, overlap them, and scan between the two. Monturo reviewed the bunter marks by magnifying the marks left by the bunter tool, in this case "FC 9MM LUGER." Monturo looked at microscopic scratches to see if the scratches lined up and matched.

{¶ 204} Based on Monturo's testimony, the trial court did not abuse its discretion when it permitted Monturo to testify about his comparison of the bunter marks on the cartridges. An examination of bunter marks is beyond the knowledge or experience of laypersons, and Monturo's testimony established that he has extensive training in tool mark examination and comparisons. His training included course work, visits to manufacturing facilities, and visits to other laboratories to work under other firearm examiners. Monturo had been a firearm and tool mark examiner for eleven years, and had conducted thousands of examinations of firearms and tool marks, including examinations of bunter marks. Although Monturo acknowledged that he did not receive specific training on bunter marks and there were no specific protocols or standards associated with identification and comparison of bunter marks, Monturo testified that bunter marks were merely a

sub-set of tool marks and that the theory, the equipment, and the process is the same as other tool mark examinations. While he had not been specifically tested on bunter mark identifications, Monturo had undergone annual proficiency testing on tool mark examinations. Moreover, Monturo indicated that he used the same process of examining the cartridge casings and bullets with a comparison microscope to determine whether each of the bunter marks had the same microscopic scratches. The trial court reasonably determined that Monturo's testimony met the requirements of Evid.R. 702.

{¶ 205} The sixth assignment of error is overruled.

VIII.

{¶ 206} Green's seventh assignment of error reads:

{¶ 207} "MR. GREEN WAS CONVICTED ON A DEFECTIVE INDICTMENT."

{¶ 208} In his seventh assignment of error, Green claims that the indictment for aggravated robbery was fatally defective, because it failed to include the requisite mental state, in violation of *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 ("*Colon I*").

{¶ 209} "The purposes of an indictment are to give an accused adequate notice of the charge, and enable an accused to protect himself or herself from any future prosecutions for the same incident." *State v. Buehner*, 110 Ohio St.3d 403, 2006-Ohio-4707, at ¶7, citing *Weaver v. Sacks* (1962), 173 Ohio St. 415, 417. In *Colon I*, the Supreme Court of Ohio "held that omission of mens rea elements when charging offenses other than strict-liability offenses, for which no

culpable mental state is required to commit the offense, is a structural error and therefore fatal." *State v. Gillispie*, Montgomery App. No. 22666, 2009-Ohio-1634, at ¶5, citing *Colon I*, supra. The Supreme Court has since clarified "that where a defective indictment was not inextricably linked to other errors, plain error analysis, rather than structural error analysis, would be appropriate." *State v. Bell*, Montgomery App. No. 22448, 2009-Ohio-4783, at ¶12, citing *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, at ¶7 ("*Colon II*") and *State v. Taylor*, Montgomery App. No. 22564, 2009-Ohio-806, at ¶17.

{¶ 210} Green was charged with aggravated robbery, in violation of R.C. 2911.01(A)(3), in Count II of the indictment. That charge read: "ROGER SHAWN GREEN, on or about February 7, 2004, in Greene County, Ohio, in attempting or committing a theft offense, as defined in R.C. 2913.01, or in fleeing immediately after the attempt or offense, did inflict or attempt to inflict serious physical harm on another, to wit: John David Banks, contrary to and in violation of Section 2911.01(A)(3) of the Ohio Revised Code and against the peace and dignity of the State of Ohio. (Said offense being Aggravated Robbery, a felony of the first degree)"

{¶ 211} An indictment charging aggravated robbery based on serious physical harm must contain the culpability state of recklessness as it applies to the "physical harm" element of the offense. See *Colon I*, supra. Similar to *Colon I*, Green's indictment failed to allege that Green had *recklessly* inflicted or attempted to inflict serious physical harm.

{¶ 212} Unlike *Colon I*, however, the lack of a requisite mental state did

not permeate Green's proceedings. In Count I of the indictment, Green was charged with aggravated murder, which alleged that Green "did purposefully cause the death" of John Banks while committing, attempting to commit, or fleeing immediately after committing aggravated robbery. Purposefulness is a stricter mental state than recklessness, and evidence that Green purposefully committed serious physical harm – in this case, death – would satisfy the State's burden to prove that Green recklessly inflicted serious physical harm in committing a theft offense. The State argued throughout the trial that the "serious physical harm" committed during the aggravated robbery was the purposeful death of Banks, the jury was instructed on the definition of "purposefully," and the jury found Green guilty of aggravated murder. Because Green's conviction for aggravated robbery was based, in part, on a finding that he had acted purposefully in causing Banks' death, the omission of the culpability state of recklessness in the aggravated robbery count was not a structural flaw.

{¶ 213} The seventh assignment of error is overruled.

IX.

{¶ 214} Green's eighth assignment of error states:

{¶ 215} "THE TRIAL COURT ERRED BY SENTENCING MR. GREEN FOR AGGRAVATED MURDER IN THE COURSE OF COMMITTING AGGRAVATED ROBBERY AND AGGRAVATED ROBBERY."

{¶ 216} In his eighth assignment of error, Green claims that the trial court erred in sentencing him for both aggravated murder and aggravated robbery, because the two offenses constitute allied offenses of similar import.

{¶ 217} R.C. 2941.25 provides:

{¶ 218} "(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

{¶ 219} "(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

{¶ 220} "R.C. 2941.25 codifies the double jeopardy protections in the federal and Ohio constitutions, which prohibit courts from imposing cumulative or multiple punishments for the same criminal conduct unless the legislature has expressed an intent to impose them. R.C. 2941.25 expresses the legislature's intent to prohibit multiple convictions for offenses which are allied offenses of similar import per paragraph (A) of that section, unless the conditions of paragraph (B) are also satisfied." *State v. Barker*, Montgomery App. No. 22779, 2009-Ohio-3511, at ¶22, citing *State v. Rance* (1999), 85 Ohio St.3d 632.

{¶ 221} In determining whether offenses are allied offenses of similar import under R.C. 2941.25, courts are not to employ a strict textual comparison of the offenses. *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625. Rather, offenses are allied "if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in

commission of the other[.]" Id. at ¶26.

{¶ 222} Comparing the elements of aggravated murder and aggravated robbery, as *Cabrales* instructs, the two offenses are not allied offenses of similar import. Aggravated murder requires purposefully causing the death of another while committing one of nine specified felonies, of which aggravated robbery is only one. Aggravated robbery, in contrast, requires only that the defendant recklessly inflict or attempt to inflict serious physical harm; a purposeful killing is not required. In short, aggravated robbery can be committed without committing aggravated murder, and aggravated murder can be committed without committing an aggravated robbery. Accordingly, aggravated robbery and aggravated murder are not allied offenses of similar import. See, e.g., *State v. Coley*, 93 Ohio St.3d 253, 264, 2001-Ohio-1340 (noting that the supreme court "has repeatedly rejected similar double-jeopardy claims and held that aggravated murder is not an allied offense of similar import to an underlying aggravated robbery"); *State v. Smith* (1997), 80 Ohio St.3d 89, 117; *State v. Bickerstaff* (1984), 10 Ohio St.3d 62, syllabus.

{¶ 223} Green's eighth assignment of error is overruled.

X.

{¶ 224} Having overruled each of the assignments of error, the judgment of the trial court will be affirmed.

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BROGAN, J. and FAIN, J., concur.

Copies mailed to:

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