[Cite as *State v. McGuire*, 2015-Ohio-1887.]

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
ALLEN COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE, **CASE NO. 1-13-47**

v.

CHARLES E. MCGUIRE, **O P I N I O N**

DEFENDANT-APPELLANT.

Appeal from Allen County Common Pleas Court
Trial Court No. CR20130016

Judgment Affirmed in Part, Reversed in Part and Cause Remanded

Date of Decision: May 18, 2015

APPEARANCES:

Michael J. Short **for Appellant**

Jana E. Emerick **for Appellee**

ROGERS, P.J.

{¶1} Defendant-Appellant, Charles McGuire, appeals the judgment of the Court of Common Pleas of Allen County convicting him of murder, aggravated burglary, and aggravated robbery and sentencing him to 25 years to life in prison. On appeal, McGuire argues that the trial court erred by: (1) entering verdicts that were not supported by sufficient evidence; (2) entering verdicts that were against the manifest weight of the evidence; and (3) imposing a mandatory sentence for his aggravated robbery conviction. McGuire also claims that the State engaged in prosecutorial misconduct. For the reasons that follow, we affirm in part and reverse in part the trial court's judgment.

{¶2} This case arises from a home invasion that occurred on December 27, 2012. On that night, James Gipson entered the home of Tim and Juanita Donegan, armed with a crowbar. A struggle ensued, and Gipson was stabbed two times by one of Juanita's sons. Gipson later died as a result of his stab wounds.

{¶3} On February 14, 2013, the Allen County Grand Jury indicted McGuire on one count of aggravated burglary in violation of R.C. 2911.11(A)(1), a felony of the first degree; one count of aggravated robbery in violation of R.C. 2911.01(A)(3), a felony of the first degree; and one count of murder in violation of R.C. 2903.02(B). The indictment arose from McGuire's alleged involvement in the home invasion.

{¶4} McGuire filed a motion in limine on June 14, 2013. In his motion, he sought to prohibit the State from presenting any evidence of "other crimes, wrongs or acts for which [he] is not specifically indicted." (Docket No. 79, p. 1). Further, McGuire sought to exclude all testimony from Carrie Lamb in regard to what "James 'Bird' Gibson[1] [sic] told her on December 27, 2012." (*Id.*). Specifically, he alleged that Lamb's testimony would be hearsay pursuant to Evid.R. 801 and would not qualify under any hearsay exception.

{¶5} The State filed its response to McGuire's motion in limine on July 3, 2013. The State argued that Lamb's statements were admissible under R.C. 2945.59, Evid.R. 801(D)(2)(e), 803(3), and 804(B)(3). The State also cited to the Ohio Supreme Court's decision in *State v. Hand*, 107 Ohio St.3d 378, 2006-Ohio-18, for the proposition that Lamb's statements would be admissible at trial.

{¶6} Lamb's statements to the police are summarized as follows. Gipson told Lamb that a person named "C.J." was going to pay him $200 and forgive a small debt if Gipson would go to someone's house and steal a television and Xbox 360. Lamb also told police officers that Angela Jordan, one of her neighbors, told her that she saw $200 in Gipson's pocket after he had been stabbed. However, police officers did not find any money on Gipson's person.

[1] We note that "James Gipson" was erroneously referred to as "Gibson" throughout the trial proceedings.

{¶7} The trial court overruled McGuire's motion in limine on July 10, 2013. It found that the statements were admissible under Evid.R. 803 as these statements were evidence of the declarant's then existing state of mind. It also found that Evid.R. 804 and 801(D) were applicable as well. Lastly, the trial court found that "there is independent proof of the conspiracy as, again, there is in the matter at hand evidence of the finding of $200.00 on Gipson's person at the time of his body being found and the sum is consistent [with] what Gipson is said to have reported to Ms. Lamb as the 'charge', price, or the consideration Gipson was getting for fulfilling 'C.J.'s' requested task." (Docket No. 120, p. 4). Lastly, the trial court found that the statements Gipson made to Lamb were non-testimonial and therefore not subject to the confrontation clause.

{¶8} This matter proceeded to trial on July 22, 2013, and ended on July 24, 2013. The State's first witness was Michael Hartman, who testified that he lives with his mother, Juanita Donegan; step-father, Tim Donegan; and his little brother, C.J.[2] Hartman at 1136 Catalpa Avenue. Michael stated that he knows McGuire because McGuire is an acquaintance of his step-father. Michael admitted to buying marijuana from McGuire a couple of weeks before the home invasion. Michael told McGuire that he did not have any money on him, but would be able to give McGuire a gift card he would receive on Christmas. Michael testified that

[2] While C.J.'s name is actually Charles Hartman, he goes by "C.J." Michael explained that McGuire also has the nickname of "C.J."

they both agreed that McGuire would sell him marijuana in exchange for the gift card. According to Michael, he received $45 worth of marijuana.

{¶9} On December 20, 2012, Michael was at work, but later found out that McGuire, McGuire's cousin, Tarockis, and a woman were at his house harassing his family about his drug debt. As a result of this incident, Michael stated that his family filed a restraining order against McGuire, which was filed on December 26, 2013. He testified that his family was "very scared" and "were intimidated" by McGuire and his friends. *Id.* at p. 214. Michael also stated that McGuire would call the house and ask for rides. His parents "obliged because they were afraid that if they didn't do what he asked or told [them] that more harm would have came [sic] to the family." *Id.*

{¶10} Michael then testified as to the events that occurred on the night of December 27, 2012. He stated that around 8:00 p.m., he was watching a movie with Juanita and C.J., and Tim was sleeping in another room. While watching the movie, somebody knocked on their front door. Michael answered the door, and the man asked for Juanita and asked if he could use their phone. Michael testified that he did not recognize the man, but let him into the house anyways. Although Michael did not know who the man was at that time, he was later able to identify him as Gipson. When Gipson came into the house, he asked Michael to shut the curtains. When Michael refused, Gipson became "hostile." *Id.* at 219. Gipson

then took out a crow bar from his coat and demanded "our X-Box, our TV, our Christmas presents, everything in the house with a value [was] pretty much his words." *Id.* at 223.

{¶11} At this point, Juanita came out of the bathroom and picked up a beer bottle. Gipson swung the crowbar at Juanita, and Michael tackled Gipson to the ground. While Michael and Gipson were fighting, Gipson hit him in the head with the crowbar. As Michael was recovering from the blow, C.J. "jump[ed] up and stab[bed] [Gipson] twice within the abdomen region." *Id.* at p. 226. Michael testified:

> I'm wrestling Mr. Gibson [sic]. My step-dad comes out and he gets involved and we both start wrestling him. And he manages to get outside. And I stand up to pull him back into the house and he takes off his coat and the hoodie that was underneath it so all he had on was a red or white shirt that was red with blood. And he starts running towards Holmes, which is where he lived, I found out later. And he was running away he was yelling, "I'm sorry. I'm sorry."

Id. at p. 228.

{¶12} On cross-examination, Michael talked about the marijuana he bought from McGuire. Michael stated that McGuire told him it was "kush," which is a type of marijuana that is more expensive than regular marijuana. Michael stated that an ounce of kush would cost $175 dollars, however, Michael told McGuire that he did not believe that the marijuana was kush. Specifically, Michael testified that

> [w]e had talked about it and I told him that it was not kush and that I wasn't paying like the price that he wanted me to, but I would give him the seventy-five ($75.00) dollar gift card for it, which in my mind was too much. But since I had made him wait for it, seventy-five ($75.00) dollars in my mind was good enough.

Id. at 233. Michael also stated that he was unaware that his step-father allegedly owed McGuire money.

{¶13} Michael testified that he had never seen Gipson before that night. He also admitted that Gipson never mentioned McGuire's name that night. Michael stated that his family never had any problems with McGuire before. He also stated that after the incident on December 20, 2012, his parents were still giving McGuire rides and storing their meat in McGuire's refrigerator.

{¶14} The State's next witness was Juanita Donegan. She testified that on December 20, 2012, Tarockis and Heather Lambert came to her house demanding payment for Michael's "drug debt." *Id.* at p. 243. She testified:

> A: They came in and [Tarockis] was immediately confrontational with me, demanding money.
>
> Q: Okay.
>
> A: Demanding money for Michael's, quote, unquote, drug debt.
>
> Q: Okay. And was he just demanding money?
>
> A: It started off as that. And then when I repeatedly told him I do not have any money he says, "well", as he's in my face, like in my face, he's saying, "well, then we'll take that and that, pointing to my TV and my son's X-Box, and all of that (indicating). It was the 20th so all our Christmas presents were on display.

> Q: All right. So, what else happened?
>
> A: Just repeatedly, repeatedly, in my face about he wanted the money. He wanted the money. He wanted the money. "When C.J.," – that's what he referred to as McGuire –
>
> Q: Uh-huh.
>
> A: – "going to get his money?" and I'm like, "look, I don't have any money." And it wasn't very long – it seemed like a long time, but it wasn't very long – and McGuire came to the door and came in. And at first he was real rational, kind of – kind of pulling the sweetie pie, that, "hey, you know, I – I understand" and all that. Look, I don't under – first, of all I didn't understand how it went from a forty ($40.00) dollar drug debt to a seven hundred and fifty ($750.00) dollar drug debt. And he's like, "well, there's interest." I'm like, "that's a lot of interest."

Id. at p. 243-244.

{¶15} Juanita then gave McGuire two $75 visa gift cards, but McGuire still demanded the remaining $600. Juanita told McGuire that she would pay him the $600 when her husband got paid on January 1. McGuire then told Juanita that if she did not pay him the $600, he would be back to beat up her husband and Michael. After this incident, Juanita stated that she went to the prosecutor's office and filed a temporary protection order ("TPO") against McGuire.

{¶16} On December 27, around 8:00 or 8:30 p.m., Juanita was getting ready to watch a movie with her two sons when she heard a knock on the door. As she came out of the bathroom, she saw a man who she did not recognize. She then testified that

> [the man was] like, "well, first off," looking at Michael, "you need to" – "you need to close the window." It's like immediate, "no, he doesn't. You need to get the fuck out." And he kind of shook his arm and I saw the hook of a crowbar. And I'm like, "you need to get the fuck out." He's like, "No. You're going to give me that and that," pointing to my television and X-Box. I'm like, "no," again, "no, you're going to get the fuck out." And at that point I – it happened like boom, boom, boom. Crowbar came out of his sleeve. Michael jumped up. I'm not exactly real clear on what happened. I know Michael jumped up. For some reason, I don't know why, I grabbed the first weapon, something I could use as a weapon, which happened to be a beer bottle. I saw a crowbar. I jerked back. It hit me. It didn't like knock me out. It didn't hit me hard.

Id. at p. 254-255.

{¶17} Although she was not knocked out, Juanita did not see what happened next. She then had the following relevant exchange:

> Q: Now, after this happened, did you hear anything else from the defendant, Charles McGuire?
>
> A: I kind of – I thought it was him came up as we were – as Michael and I were going in the ambulance, "hey, what's going on?" That's all I know.
>
> Q: Did you speak with him?
>
> A: No. I was – I was going in the ambulance. I was more concerned about my bleeding son than anything.
>
> Q: And after the 27th did you hear from the defendant?
>
> A: No.

Id. at p. 262.

{¶18} On cross-examination, Juanita admitted that her husband and McGuire spent a lot of time together. Specifically, Juanita stated that her husband would go over to McGuire's to use his computer and refrigerator. McGuire later told Juanita that Tim was using his computer to meet women online. She also stated that Tim would give McGuire rides to work. Juanita heard that Tim broke McGuire's chair and admitted that he might have owed McGuire money for the chair. She also admitted to giving McGuire and his friends rides, even after she got a TPO against McGuire.

{¶19} On redirect examination, Juanita explained that she continued to give McGuire rides, even after she got the TPO, because she did not want to do anything out of the ordinary or anger McGuire any further.

{¶20} C.J. Hartman was the next witness for the State. He testified that he knew McGuire through Tim. On December, 20, 2012, C.J. was at home when McGuire and Tarockis came into the house and said that Michael owed them money. Tarockis told his family that they owed him $750 and that if they did not pay him, he would take their television, Xbox, and Christmas presents. After Tarockis threatened his family, McGuire came into the house. According to C.J., at first McGuire was nice, but eventually McGuire started to threaten Tim and Michael. McGuire left after Juanita gave him some gift cards and promised to have the rest of his money by January 1.

{¶21} C.J. testified that around 7:00 or 8:00 p.m., on December 27, 2012, a man knocked on the door to his house. C.J. stated that he had never seen the man before, but later identified the man as Gipson. After Gipson came inside, he demanded their television and Xbox. When C.J.'s family refused, Gipson took out a crowbar from his jacket and started swinging. C.J. testified that his mother picked up a beer bottle, and Michael tackled Gipson to the ground. Gipson hit Michael on the head with the crowbar and Michael started to bleed. C.J. then stated he picked up his knife and stabbed Gipson. Gipson then turned around, and C.J. believed that he was going to hit him, so he stabbed Gipson again.

{¶22} On cross-examination, C.J. denied that McGuire sold Michael kush. C.J. stated that he smoked the marijuana with Michael and it "was not very good marijuana." *Id.* at p. 307. C.J. also denied that Gipson initially demanded money when he went into the house. C.J. testified that Gipson only wanted their television and Xbox. He later found out that Gipson lived nearby and stated that he did not hear Gipson pull up in a car. Further, C.J. testified that Gipson did not mention McGuire at all during the incident.

{¶23} Patrolman Dustin Brotherwood of the Lima Police Department was the next witness to testify. He testified that he was working on the night of December 27, 2012, and was dispatched to a home invasion. After arriving on the scene, Patrolman Brotherwood started to look for the suspect who had fled the

scene. He stated that he found the suspect, who he later identified as Gipson, in front of 1119 Holmes Street.

{¶24} On cross-examination, Patrolman Brotherwood had the following relevant exchange:

> Q: Okay. Now, did you ever have an opportunity to speak to Ms. – Ms. Lamb?
>
> A: Very –
>
> Q: I mean, yes, Carrie Lamb?
>
> A: Very briefly.
>
> Q: As a matter of fact, she made a couple of unsolicited statements for you, right?
>
> A: Yes, sir.
>
> Q: She indicated that – that [Gipson] had been feuding on Catalpa with people?
>
> A: Yes, sir.

Id. at p. 326. Patrolman Brotherwood also stated that when he arrived, Gipson was still alive, but he did not try to question him.

{¶25} The State then called Samantha Henline, who testified that she dated McGuire towards the end of 2012. She testified that she was aware that McGuire sold marijuana to Michael and C.J. She stated that they agreed that the marijuana would be paid for in gift cards. She also stated that Gipson would buy marijuana from McGuire, in her presence. Henline testified Gipson did not buy the

marijuana on credit and that she was unaware of any argument between Gipson and McGuire.

{¶26} Henline stated that she was in the car with McGuire, Heather Lambert, Tarockis, and Tim Donegan, on December 20, 2012. During that car ride, McGuire and Tim had a conversation about a drug debt that one of Tim's sons owed. Henline stated that McGuire said the drug debt was $300 and that if it was not paid by midnight, then it was going to be more. Henline stated that she heard McGuire say he would take their television if the debt was not paid.

{¶27} On cross-examination, Henline stated that she remembered when Tim was over at McGuire's house and broke a chair. She stated that McGuire mentioned the chair when they were in the car discussing Michael's drug debt. She also testified that Tim and McGuire were laughing and it seemed like they were "just playing around * * *." *Id.* at p. 381. She then had the following relevant exchange:

> Q: Okay. Now, you – in that time that you were hanging around with Mr. McGuire, you said you met [Gipson] one time?
>
> A: Yes.
>
> Q: Okay. Did you get the impression that [Gipson] worked for [McGuire] or did –
>
> A: No.
>
> Q: Was a gopher for him?

A: No.

Q: No. Not at all?

A: No.

Id. at p. 382.

{¶28} On redirect examination, she admitted that she told Detective Clark that she overheard a conversation between Gipson and McGuire about Gipson owing McGuire money and having till the end of the month to pay it back.

{¶29} Heather Lambert then testified as to what happened during the car ride on December 20, 2012. She stated that McGuire told Tim that his stepson owed him money and that the debt would go up the longer he had to wait. Specifically, McGuire said that "he owed him three hundred. Then it would go to six hundred, eight hundred, and so forth the longer he had to wait." *Id.* at p. 394. McGuire also said that he would take anything valuable in Tim's house to pay the debt, including the television, Xbox, and Christmas presents. Lambert testified that after they got out of the car, McGuire told Tarockis to go to Tim's house to tell Juanita that the debt needed to be paid.

{¶30} Lambert walked with Tarockis to Tim's house because she had left her drink in Tim's car. McGuire eventually joined her and Tarockis at the Donegans'. Lambert testified that after McGuire came over, he started arguing with Juanita.

> So, they start arguing. She made it clear she didn't have the money. That she wouldn't have the money. She doesn't have that type of money around. That the only money they had on them were 2 Wal-Mart gift cards at the time that she did give to him. And then it progressed from there to arguing, to him smacking Tim again, pushing him, punching him, still telling the lady that they needed the money.

Id. at p. 388. Lambert admitted that she pushed Tim but testified that McGuire told her to do it. Lambert stated that Tim had kissed her and was cheating on Juanita.

{¶31} On cross-examination, Lambert testified that she heard Juanita tell McGuire that she would pay him his money on January 3.

{¶32} Carrie Lamb was the next witness for the State and testified that Gipson was her boyfriend and father of her twin girls. Lamb testified that Gipson knew McGuire because Gipson would buy his marijuana from McGuire. On December 27, 2012, Lamb testified that Gipson was going back and forth from their house to McGuire's house. She stated that McGuire invited Gipson to come over and smoke blunts with him. Lamb testified that she started to text Gipson, and he replied that he was "going to go do something." *Id.* at p. 422. She stated that Gipson came back to their house to change clothes and then had the following conversation:[3]

> A: He wanted McGuire to –

[3] At this point in the trial, McGuire's counsel objected to the statement Lamb was about to make, on the basis it was impermissible hearsay. The trial court overruled the objection.

> Q: Okay. Before that, did he ask for anything? Ask you for any–
>
> A: The crowbar.
>
> Q: He asked for the crowbar. And what else?
>
> A: I told him where it was. And then he went and got it and he went out the door. But, before he went out the door he told me that McGuire wanted him to go into these people's house and take their TV and their game system.
>
> Q: Okay. And what was in it for [Gipson]?
>
> A: His debt paid off, which was like ten, fifteen dollars, and two hundred ($200.00) dollars.
>
> Q: Okay. So, it was your understanding that the reason [Gipson] went over there is because the defendant sent him there to get the TV and the X-Box and for that he was going to get his debt – his drug debt wiped out and two hundred bucks?
>
> A: Yes.

Id. at p. 423.

{¶33} On cross-examination, Lamb admitted that she told police officers, two separate times, that Gipson was feuding with people on Catalpa Avenue. She also admitted to threatening the Donegans over the phone after the home invasion. Lamb then testified:

> Q: So when [Gipson] came over to get the crowbar, when he came to get the crowbar, that's when he came home at 6:00?
>
> A: No. When he came and got the crowbar that was about 8:00 something.

> Q: Okay. So he, had gotten home about 6:00. He left. And then he came back again?
>
> A: Yeah. He went over to McGuire's house to smoke with him. Came back. Said something about the changing table and stuff. And then he was going to go back over to McGuire's house and – and relax with him, I guess. And –
>
> Q: So, that was at 8:17 when he left?
>
> A: Yes.

Id. at p. 440-441.

{¶34} Lamb also acknowledged making the statement that Gipson had $200 on his person. She stated that her neighbor, Angela Jordan, was tending to Gipson after he got stabbed and Jordan "told me that [Gipson] had – was pointing to his pockets [and] that she pulled out two hundred ($200.00) dollars * * *." *Id.* at p. 446. However, Lamb asked the detectives about the money and they told her that they did not recover any money from Gipson's person.

{¶35} Detective Kent Miller of the Lima Police Department was the next witness to testify for the State. Detective Miller was one of the lead detectives on McGuire's case and assisted in conducting some of the interviews as well as analyzing phone records and data. From his investigation, Detective Miller was able to piece together a timeline of the events of December 27, 2012. He stated that on that day, Gipson called McGuire at 6:15 p.m.; at 6:43 McGuire called Gipson; and at 6:44 Gipson called McGuire. Gipson placed another call to

McGuire around 7:06. From his interview with Lamb, Detective Miller determined that Gipson was over at McGuire's from 7:06 to shortly after 8:00 p.m. Carrie sent Gipson two text messages, and then at 8:03 p.m., Gipson sent Carrie a text message that read, "I [sic] going to do something." (State's Exhibit 35, p. 1). Carrie then sent Gipson 21 text messages that went unanswered. Her last text message to Gipson was at 8:12 p.m. Based upon his conversation with Lamb, Detective Miller assumed that Gipson arrived home, changed his clothes and grabbed the crowbar "slightly after 8:12 p.m." Trial Tr., p. 473. After Gipson left his house, he placed a call to McGuire at 8:23 p.m., which lasted 59 seconds. Then, at 8:29 p.m., a 9-1-1 call was placed by the Donegans.

{¶36} By 8:31 p.m., Gipson had a missed call from Lamb. Gipson also had a missed call from McGuire at 8:49 p.m. The Donegans then received missed calls from McGuire at 9:38 p.m. and at 12:03 a.m. Detective Miller testified that he believed these phone calls were very important to the investigation.

{¶37} The State then called Doctor Maneesha Pandey, a deputy coroner and forensic pathologist at the Lucas County Coroner's Office. It was stipulated that Dr. Pandey was an expert in forensic pathology. Dr. Pandey testified that Gipson's cause of death was "sharp force trauma to torso. And the manner of death was homicide." *Id.* at p. 508. She also testified that Gipson's urine tested

positive for marijuana, which was consistent with recent exposure to marijuana. She also testified that she did not detect any alcohol in Gipson's blood.

{¶38} After Dr. Pandey's testimony, the trial court received all of the State's exhibits into evidence, and the State rested. McGuire moved for acquittal under Crim.R. 29, but the trial court denied the motion.

{¶39} McGuire's first witness was Patrolman Jason Warren of the Lima Police Department. Patrolman Warren responded to the home invasion on December 27, 2012. Patrolman Warren drove down Holmes Avenue in pursuit of the suspect. Patrolman Warren testified that he heard screaming on Holmes Avenue, so he stopped his car and saw two women surrounding a man who was lying in the snow. Patrolman Warren asked Carrie Lamb what had happened, and she "told [him] that there had been an argument with the neighbors across the way. She didn't specific – specify where. And that he had been defending her." *Id.* at p. 524.

{¶40} Angela Jordan, Gipson and Lamb's neighbor, then testified. She testified that on the night of December 27, 2012, she was taking out her trash and heard screaming. She testified that Lamb was standing over Gipson and was kicking him. Jordan tried to stop the bleeding and told Lamb to get blankets. Jordan denied ever telling Lamb that McGuire had $200 in his pockets. She also testified that she did not see Lamb's son outside or in Lamb's house.

{¶41} Amy Williams, one of McGuire's ex-girlfriends, was the next witness to testify. She testified that she was at McGuire's house on the night of December 27, 2012. Williams also testified that Gipson came over to McGuire's for about 20 minutes that night. She stated that they were not smoking marijuana, but they were drinking Black Velvet. She stated that McGuire was offering to sell Gipson a crib. Gipson said that he would come back with his girlfriend to look at the crib. According to Williams, she did not hear McGuire and Gipson discuss collecting a debt. Williams testified she left McGuire's around 9:00 or 10:00 p.m. because he was drinking and that McGuire could get "ugly" when he was drinking. *Id.* at p. 545.

{¶42} On cross-examination, Williams admitted that Gipson could have been at McGuire's earlier in the day. She also stated that McGuire and Gipson could have had other conversations while she was out of the room.

{¶43} McGuire then testified on his own behalf. McGuire first admitted to having a criminal record. Specifically, McGuire stated that he has been convicted of receiving stolen property, robbery, and assault on a police officer. McGuire also admitted that he initially lied to Detective Clark when asked if he sold drugs. McGuire testified that he would occasionally sell drugs, but denied it to Detective Clark because he was still on post release control and did not want to get a violation.

{¶44} McGuire admitted to selling marijuana to Michael. However, he testified that it was "kush" and that it was worth $175. *Id.* at p. 566. He also stated that Tim broke his rocking chair that was worth $300.

{¶45} McGuire testified that on December 20, 2012, he was in the car with Tim, Tarockis, Heather Lambert, and Samantha Henline. He admitted that he told Tim that Michael owed him money for the marijuana he sold him, but denied threatening Tim. McGuire testified that after he got back to his house, Heather told him that Tim had tried to kiss her. Heather decided to tell Juanita what had happened and went to the Donegans' house with Tarockis. McGuire testified that he went over to make sure everything was okay. McGuire stated that while he was there, he reminded Tim and Juanita that they owed him $750. McGuire explained why he believed he was owed $750:

> Okay, it goes like this here. The chair was three hundred ($300.00) dollars. Then you got a hundred and fifty ($150.00) dollars of miscellaneous loans. You got ($50.00) dollars for putting the food in [my] refrigerator because they [sic] freezer went out. You got fifty ($50.00) dollars for him always using my laptop. Then you – then you got two hundred ($200.00) dollars for the weed. And then it was fifty ($50.00) dollars for something else, you know.

Id. at p. 575. According to McGuire, Juanita agreed to pay the debt on January 1. However, a few days later, she informed him that she would pay it on January 3.

{¶46} McGuire denied knowing that Juanita and Tim had gotten a TPO against him. He stated that Juanita and Tim called his phone, came to his house,

and gave him rides after filing the TPO. He testified that he did not find out about the TPO until he was served papers in jail on February 14, 2013.

{¶47} McGuire knew Gipson from the neighborhood and denied that Gipson ever worked for him or pushed drugs for him. On December 27, 2012, Gipson paid McGuire $10 or $15 for marijuana and cigarettes. McGuire testified he saw Gipson a couple of times that day. Gipson came over to his house early in the day and the last time he was at his house was around 8:00 p.m. McGuire testified that Gipson took a shot of Black Velvet with McGuire. McGuire denied telling Gipson about the debt that the Donegans owed him, but acknowledged Gipson could have known about it. McGuire stated that his neighborhood "it's like the pro – projects. The – this neighbor know what this neighbor's doing. Everybody know what everybody is doing. So everybody know everybody's business. It's one of them type of neighborhoods." *Id.* at p. 589.

{¶48} When Gipson came over to McGuire's house around 8:00 p.m., McGuire testified that they were talking about a crib and changing table. McGuire did not need them anymore and knew that Gipson was expecting twins so he offered to sell the table and crib to Gipson for $80. McGuire testified that Gipson said that he had to talk to Lamb about it and bring her back to look at the table and crib. McGuire stated that around 8:23 p.m., Gipson called him and said that he

would be back in a little while to give him the money for the table and crib. McGuire claimed he had no idea that Gipson was going to the Donegans' house.

{¶49} McGuire testified that he offered to take a lie detector test when he was questioned by police officers and also offered to give them his fingerprints. He stated that it did not make sense to pay Gipson to rob the Donegans because their television and Xbox would not be worth very much money at a pawn shop. He said that he was waiting for Juanita to pay him the remaining $600 debt on January 3.

{¶50} On cross-examination, McGuire denied telling Detective Clark that $300 of the debt was interest he was charging the Donegans.

{¶51} After McGuire's testimony, the defense rested. The State then called Detective Clark as a rebuttal witness. Detective Clark testified that when he interviewed McGuire, he stated that

> A: Tim Donegan owed him a hundred ($100.00) dollars for various, you know, lending's [sic]. And that he had broken a chair at his house and he had decided the he owed him two hundred and fifty ($250.00) dollars for that for a total of three hundred and fifty in actual items or debt.
>
> Q: Okay. But he told you that he – he told him that the debt was six-fifty, right?
>
> A: He – he eventually told me that the Donegan's [sic] owed him seven hundred and fifty ($750.00) dollars. And he admitted to me that the Donegan's [sic] had paid on that debt by giving him 2 credit cards, which were a hundred and fifty ($150.00) dollar total value, which then lowered the debt to six hundred ($600.00) dollars.

* * *

Q: Okay. And as a matter of fact, you talked to him about that and – and he didn't have a good answer why the interest was so high, right?

A: No. He told me that he assessed interest for the debt.

Id. at p. 647-648.

{¶52} McGuire then renewed his Crim.R. 29 motion, which the trial court denied. Both the State and McGuire offered their closing statements, and the trial court charged the jury before deliberations.

{¶53} On July 24, 2013, the jury returned guilty verdicts on all three counts alleged in the indictment. The trial court then ordered a presentence investigation report. On August 28, 2013, the trial court held a sentencing hearing. The trial court merged the aggravated robbery and aggravated burglary convictions, and the State elected to proceed on the aggravated robbery charge. The trial court sentenced McGuire to 10 years in prison for the aggravated robbery charge and 15 years to life in prison for the murder charge. The trial court further ordered that the two prison terms run consecutively. On September 3, 2013, the trial court issued a judgment entry journalizing McGuire's conviction and sentence.

{¶54} McGuire timely appealed this judgment, presenting the following assignments of error for our review.

Assignment of Error No. I

THE CONVICTIONS ARE NOT SUPPORTED BY THE WEIGHT OF THE EVIDENCE.

Assignment of Error No. II

THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE CONVICTIONS.

Assignment of Error No. III

THE DEFENDANT WAS DENIED A FAIR TRIAL BECAUSE OF IMPROPER STATEMENTS MADE BY THE PROSECUTOR.

Assignment of Error No. IV

THE TRIAL COURT ERRED IN IMPOSING A MANDATORY SENTENCE FOR HIS CONVICTION OF AGGRAVATED ROBBERY, A VIOLATION OF 2911.11(A)(1), A FIRST DEGREE FELONY.

{¶55} Due to the nature of the assignments of error, we elect to address the assignments of error out of order.

{¶56} Before addressing the assignments of error, we note that McGuire's brief failed to conform to the Appellate Rules of Procedure and the Local Rules of this court. Pursuant to Local Rule 11(A), assignments of error should "be separately argued in the briefs unless the same argument, and no other, pertains to more than one assignment of error." *See also* App.R. 12(A)(2); App.R. 16(A). McGuire combined the arguments related to his first two assignments of error under one section in his brief. We discourage this practice as it is contrary to the

rules and disorderly. While App.R. 12(A)(2) gives this court the authority to disregard an assignment of error if the appellant "fails to argue the assignment separately in the brief," in the interest of justice, we elect to address the merits of McGuire's arguments.

Assignment of Error No. II

{¶57} In his second assignment of error, McGuire argues that the State did not present sufficient evidence to support his convictions. We disagree.

Sufficiency Standard

{¶58} When an appellate court reviews the record for sufficiency, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *State v. Monroe*, 105 Ohio St.3d 384, 2005-Ohio-2282, ¶ 47. Sufficiency is a test of adequacy. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997), *superseded by constitutional amendment on other grounds as stated in State v. Smith*, 80 Ohio St.3d 89 (1997). Accordingly, the question of whether the offered evidence is sufficient to sustain a verdict is a question of law. *State v. Wingate*, 9th Dist. Summit No. 26433, 2013-Ohio-2079, ¶ 4.

Aggravated Robbery & Burglary Convictions

{¶59} Initially, we note that McGuire does not dispute that Gipson robbed or burglarized the Donegans. He only argues that he was not complicit in Gipson's actions. Thus, we need not summarize the evidence the State presented that showed that Gipson committed the robbery and burglary offenses. We will only recapitulate the evidence that showed McGuire was complicit in Gipson's actions.

{¶60} Complicity is defined as, "No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following: (1) solicit or procure another to commit the offense; [or] (2) aid or abet another in committing the offense[.]" R.C. 2923.03(A)(1), (2). Therefore, in order for there to be sufficient evidence, the State had to produce evidence, that when viewed in the light most favorable to the state, any rational trier of fact could find that McGuire acted knowingly in soliciting or procuring Gipson to rob and burglarize the Donegans. On appeal, McGuire argues that the State failed to prove that he either solicited Gipson to commit the robbery/burglary or aided and abetted Gipson in the robbery/burglary.

{¶61} However, the State presented several witnesses who testified that McGuire and his acquaintances visited the Donegans a few days before the home invasion, demanded the money for Michael's drug debt, threatened to beat them

up, and said they would take their television and Xbox if the debt was not paid. Further, the State presented the testimony of Carrie Lamb, who testified at trial that Gipson had told her that McGuire had told him to go to someone's house and take their television and game system.[4] *See* Trial Tr., p. 423. In exchange, McGuire would forgive Gipson's $15 debt and pay him an additional $200. The State also offered evidence of Gipson's and McGuire's phone activity on the date of the home invasion. Specifically, Gipson texted Lamb at 8:03 p.m., shortly before Lamb testified he came home to change his clothes and get the crowbar, and he told her that he was "going to do something." Right before the home invasion, Gipson called McGuire, and they had a one minute phone conversation. Six minutes later, a 9-1-1 call was placed by the Donegans.

{¶62} The above evidence, when viewed in the light most favorable to the prosecution, was sufficient to support McGuire's aggravated robbery and burglary convictions.

McGuire's Murder Conviction

{¶63} McGuire was also convicted of complicity to commit murder, a violation of R.C. 2903.02(B), commonly known as felony murder. This section states, "No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a

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[4] McGuire does not argue on appeal that these statements were improperly admitted into evidence despite filing a motion in limine to exclude such statements and properly renewing his objection at trial.

felony of the first or second degree * * *." R.C. 2903.02(B). Under Ohio's felony murder statute, "it is irrelevant whether the killer is the defendant, an accomplice, or a third party." *State v. Ford*, 10th Dist. Franklin No. 07AP-803, 2008-Ohio-4373, ¶ 32. Also, the guilt or innocence of the party killed does not matter. *State v. Dixon*, 2d Dist. Montgomery No. 18582, 2002 WL 191582, *5 (Feb. 8, 2002). A defendant

> can be held criminally responsible for the killing regardless of the identity of the person killed or the identity of the person whose act directly caused the death, so long as the death is the "proximate result" of [the] Defendant's conduct in committing the underlying felony offense; that is, a direct, natural, reasonably foreseeable consequence, as opposed to an extraordinary or surprising consequence, when viewed in the light of ordinary experience.

Id.

{¶64} "It is not necessary that the accused [be] in a position to foresee the precise consequence of his conduct; only that the consequence be foreseeable in the sense that what actually transpired was natural and logical in that it was within the scope of the risk created by his conduct." *State v. Lovelace*, 137 Ohio App.3d 206, 219-220 (1st Dist.1999), quoting *State v. Losey*, 23 Ohio App.3d 93, 96 (10th Dist.1985). "Only a reasonably unforeseeable intervening cause will absolve one of criminal liability in this context." *State v. Dykas*, 185 Ohio App.3d 763, 2010-Ohio-359, ¶ 25 (8th Dist.), citing *Lovelace* at 215.

{¶65} As we recapped supra, the State presented evidence that McGuire was complicit in Gipson's attempted robbery and burglary of the Donegans. Further, the State produced evidence that showed Gipson was armed with a crowbar during the home invasion. Attempting to rob and burglarize someone in their home with a weapon might reasonably lead the victims to defend themselves with their own weapons. Thus, the death of Gipson was foreseeable. *See Dixon* at *6 ("Clearly, the shooting which killed [an accomplice] was within the scope of the risk created by [the defendant] when [they] robbed the Jiffy Lube at gunpoint.").

{¶66} When viewing the evidence in the light most favorable to the prosecution, we find that the State presented sufficient evidence to support McGuire's felony murder conviction.

{¶67} Accordingly, we overrule McGuire's second assignment of error.

Assignment of Error No. I

{¶68} In his first assignment of error, McGuire argues that his convictions are against the manifest weight of the evidence. We disagree.

Standard of Review

{¶69} When an appellate court analyzes a conviction under the manifest weight standard, it "sits as the thirteenth juror." *Thompkins*, 78 Ohio St.3d at 387. Accordingly, it must review the entire record, weigh all of the evidence and its

reasonable inferences, consider the credibility of the witnesses, and determine whether the fact finder "clearly lost its way" in resolving evidentiary conflicts and "created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983). When applying the manifest weight standard, a reviewing court should only reverse a trial court's judgment "in exceptional case[s]" when the evidence "weighs heavily against the conviction." *Id*. at paragraph three of the syllabus.

{¶70} Moreover, "A conviction is not against the manifest weight of the evidence simply because the jury chose to believe the prosecution testimony." *State v. McMullen,* 12th Dist. Butler Nos. CA2005–09–414, CA2005–10–427, CA2005–10–429, 2006–Ohio–4557, ¶ 29. Instead, this court may only overturn a jury's decision if the State's witnesses were "completely lacking in credibility * * * ." *Id.; see also State v. Bates,* 11th Dist. Portage No. 99–P–0100, 2001 WL 314855, *9 (Mar. 30, 2001).

McGuire's Arguments

{¶71} On appeal, McGuire argues that the only evidence that the State presented that showed he was involved with the robbery and burglary was the statement Gipson allegedly made shortly before he went over to the Donegans. This statement was admitted into evidence through the testimony of Carrie Lamb,

Gipson's girlfriend and mother to his unborn children. McGuire argues that Lamb's testimony was not credible.

{¶72} Specifically, McGuire points to a portion of Lamb's testimony where she testified that she saw Gipson collapse in their front yard, tried to help him, and went inside to retrieve blankets. She testified that she brought the blankets outside, but went back into her house to calm down her young son, who was looking out their window. This testimony was contradicted by Angela Jordan, who testified that Lamb was screaming and kicking Gipson when he collapsed. She confirmed that Lamb brought out blankets, but she stated that she did not see Lamb's son in the house.

{¶73} Moreover, Lamb testified that Jordan told her that Gipson had $200 in his pocket.[5] Again, this testimony was contradicted by Jordan who testified that she did not see $200 in Gipson's pocket and denied telling Lamb that Gipson had money in his pocket. Further, Lamb admitted at trial that she lied to police officers twice during their ongoing investigation. Lamb testified that she told officers that Gipson was feuding with a family on Catalpa Avenue, but later stated that this was lie. Lamb also admitted to threatening the Donegans' lives.

{¶74} However, other portions of Lamb's testimony were supported by the evidence the State presented. For example, Lamb testified that Gipson went over

[5] McGuire also does not challenge this statement as improper hearsay on appeal.

to McGuire's to smoke marijuana. Dr. Pandey testified that Gipson's urine tested positive for marijuana, which was consistent with recent exposure to marijuana. Also, the phone records of Gipson also supported Lamb's testimony of what occurred on December 27, 2012.

{¶75} McGuire argues that the jury should have believed his version of events, but his testimony was not entirely credible either. For example, McGuire denied smoking with Gipson, and testified that they were both drinking alcohol. However, the autopsy revealed that Gipson had no alcohol in his system, only marijuana. McGuire also admitted to the jury that he too had initially lied to police officers during their investigation. Further, while McGuire contacted the police when he heard they wanted to speak with him, he did not show up to a scheduled interview and a warrant had to be issued for his arrest. Lastly, McGuire denied the fact that he told Detective Clark that he was charging interest on Michael's drug debt, which was contradicted when Detective Clark testified to the opposite when he was called as a rebuttal witness.

{¶76} Ultimately, the credibility of witnesses is primarily an issue for the trier of fact. *State v. Payne*, 3d Dist. Hancock No. 5-04-21, 2004-Ohio-6487, ¶ 15. "It is well-established that '[w]hen conflicting evidence is presented at trial, a conviction is not against the manifest weight of the evidence simply because the jury believed the prosecution testimony.' " *State v. Bates*, 12th Dist. Butler No.

CA2009-06-174, 2010-Ohio-1723, ¶ 11, quoting *State v. Bromagen*, 12th Dist. Clermont No. CA2005-09-087, 2006-Ohio-4429, ¶ 38. Accordingly, this court must afford the decision of the trier of fact the appropriate deference when considering such credibility issues. We will not substitute our judgment for that of the trier of fact on the issue of witness credibility unless it is patently clear that the fact finder lost its way. *Payne* at ¶ 15; *see also State v. Parks*, 3d Dist. Van Wert No. 15-03-16, 2004-Ohio-4023, ¶ 13.

{¶77} The trier of fact was in the best position to hear all of the witnesses' testimony, observe the witnesses, and determine their reliability. We cannot say that the jury clearly lost its way in believing Lamb over McGuire.

{¶78} Therefore, we overrule McGuire's first assignment of error.

Assignment of Error No. III

{¶79} In his third assignment of error, McGuire argues that the State engaged in prosecutorial misconduct during its closing statement. We disagree.

{¶80} Initially, we note that McGuire did not object to the statements he now alleges constitute prosecutorial misconduct. As a result, McGuire has waived all but plain error. *State v. White*, 82 Ohio St.3d 16, 22 (1998), citing *State v. Slagle*, 65 Ohio St.3d 597, 604 (1992). In order to have plain error under Crim.R. 52(B), there must be an error, the error must be an "obvious" defect in the trial proceedings, and the error must have affected substantial rights." *State v. Barnes*,

94 Ohio St.3d 21, 27 (2002). Plain error is to be used "with the upmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice." *Id.* Accordingly, plain error exists only in the event that it can be said that "but for the error, the outcome of the trial would clearly have been otherwise." *State v. Biros*, 78 Ohio St.3d 426, 431 (1997).

{¶81} In closing arguments, prosecutors are entitled to some latitude regarding what the evidence has shown and the inferences that can be drawn. *State v. Ballew,* 76 Ohio St.3d 244, 255 (1996). " 'It is improper for an attorney to express his or her personal belief or opinion as to the credibility of a witness or as to the guilt of the accused.' " *State v. Van Meter,* 130 Ohio App.3d 592, 601 (3d Dist.1998), quoting *State v. Williams,* 79 Ohio St.3d 1, 12 (1997). However, "[a] prosecutor may state his opinion if it is based on the evidence presented at trial." *State v. Watson,* 61 Ohio St.3d 1, 10 (1997) *abrogated on other grounds by State v. McGuire,* 80 Ohio St.3d 390 (1997).

{¶82} The test for prosecutorial misconduct during closing argument is whether the remarks made by the prosecutor were improper and, if so, whether they prejudicially affected a substantial right of the accused. *State v. Siefer,* 3d Dist. Hancock No. 5–09–24, 2011–Ohio–1868, ¶ 46, citing *State v. White,* 82 Ohio St.3d 16, 22 (1998). We evaluate the allegedly improper statements in the context of the entire trial. *State v. Treesh,* 90 Ohio St.3d 460, 464 (2001), citing *State v.*

Keenan, 66 Ohio St.3d 402, 410 (1993). An improper comment does not affect a substantial right of the accused if it is clear beyond a reasonable doubt that the jury would have found the defendant guilty even without the improper comments. *Id.,* citing *State v. Smith,* 14 Ohio St.3d 13, 15 (1984).

{¶83} During its closing argument, the prosecutor addressed McGuire's right to review discovery in his criminal case, stating the following:

> And then before he came in the courtroom he had three plus months, by his own admission, to read over everybody's testimony. He acknowledged he knew what every single witness in this case was going to say because that was provided to him. The law requires us to provide that and he had the opportunity to review everyone's testimony. And then not only that he got to listen to everyone's testimony here in the courtroom and then take the stand having all that information, and he doesn't say anything until he knows what everybody else is going to say.

Trial Tr., p. 705.

{¶84} McGuire argues that the prosecutor's statement that he received discovery from the State was prejudicial. He contends that the prosecutor implied that McGuire was somehow dishonest when he reviewed the discovery in his case and when he sat through the trial. While we agree with McGuire that he has the constitutional right to be present at his trial and that Crim.R. 16 entitled him to discovery, McGuire does not cite a single case that supports his argument that the prosecutor's statement was improper or constitutes prosecutorial misconduct.

{¶85} McGuire also argues that the prosecutor improperly referred to evidence in the record. During summation, the prosecutor stated, "[I]f the defendant had not solicited or procured [Gipson] to do this would [Gipson], who has no criminal record, no history of violence whatsoever, would he have done this on his own? The answer is no." Trial Tr., p. 701. However, McGuire admits that Lamb testified that Gipson had no violent criminal history. Thus, there was some evidence in the record that Gipson had never been convicted of any violent crimes. We note that "[p]rosecutors are entitled to latitude as to what the evidence has shown and what inferences can be drawn from the evidence." *State v. Jackson*, 107 Ohio St.3d 300, 2006-Ohio-1, ¶ 154.

{¶86} Even if we were to assume these two statements made by the prosecutor were improper, McGuire has not demonstrated how these comments prejudiced him. Therefore, there is little chance that the result of the trial would have been different absent these comments. *See State v. Pickens*, 141 Ohio St.3d 462, 2014-Ohio-5445, ¶ 128.

{¶87} Accordingly, we overrule McGuire's third assignment of error.

Assignment of Error No. IV

{¶88} In his fourth assignment of error, McGuire argues that the trial court erred in imposing a mandatory sentence for his conviction of aggravated robbery. We agree.

{¶89} The trial court sentenced McGuire to a 10-year term of prison on the aggravated robbery count and stated that such term was mandatory pursuant to R.C. 2929.13(F). Sentencing Tr., p. 25. The State agrees[6] with McGuire and states that it knows of no statutory provision that would require a mandatory prison sentence for McGuire's aggravated robbery conviction. The only provision which might be applicable is R.C. 2929.13(F)(6), which requires a mandatory prison term for:

> Any offense that is a first or second degree felony and that is not set forth in division (F)(1), (2), (3), or (4) of this section, if the offender previously was convicted of or pleaded guilty to aggravated murder, murder, or any first or second degree felony, or an offense under an existing or former law of this state, another state, or the United States that is or was substantially equivalent to one of those offenses[.]

However, McGuire's presentence investigation report reveals that McGuire has never been previously convicted of any first or second degree felony, only third degree felonies.

{¶90} Therefore, the trial court was not required to impose a mandatory prison term and it erred in that regard. While a trial court retains discretion to sentence an offender as it deems warranted, it must sentence the offender in accordance to the applicable law. *State v. Cruz*, 8th Dist. Cuyahoga No. 96999, 2012-Ohio-1943, ¶ 10. When an offender is sentenced to a mandatory prison

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[6] We note that it was actually the State who brought this error to this court's attention in its Appellee Brief. *See* (Appellee's Br., p. 1, fn. 1). McGuire later filed a motion to raise an additional assignment of error in order to address this issue.

sentence, it carries additional ramifications, as the offender will not be eligible for community control sanctions or judicial release, or certain other reductions in sentence. *Id.* As such, McGuire's aggravated robbery sentence is contrary to law.

{¶91} Therefore, McGuire's sentence on his aggravated robbery count is vacated, and the matter is remanded for a resentencing hearing on that count.

{¶92} Accordingly, we sustain McGuire's fourth assignment of error.

{¶93} Having found no error prejudicial to McGuire in his first, second, or third assignments of error, but having found error prejudicial to McGuire in his fourth assignment of error, we affirm in part and reverse in part the trial court's judgment and remand this matter for further proceedings consistent with this opinion.

Judgment Affirmed in Part,
Reversed in Part, and
Cause Remanded

SHAW and WILLAMOWSKI, J.J., concur.

/jlr