[Cite as *State v. Taylor*, 2013-Ohio-3066.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-12-1037

Appellee — Trial Court No. CR0201001806

v.

Michael C. Taylor, III — **DECISION AND JUDGMENT**

Appellant — Decided: July 12, 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
David F. Cooper, Assistant Prosecuting Attorney, for appellee.

Mollie B. Hojnicki, for appellant.

* * * * *

SINGER, P.J.

{¶ 1} Appellant was indicted in a single-count indictment alleging a violation of R.C. 2903.02(B), murder, with a firearm specification. Appellant appealed his January 30, 2012 judgment of conviction and sentencing and asserts the following assignments of error:

FIRST ASSIGNMENT OF ERROR: The Appellant was denied his right to counsel as guaranteed by the United States and Ohio Constitutions when the court did not grant Appellant's request for new counsel.

SECOND ASSIGNMENT OF ERROR: The trial court abused its discretion in denying Appellant's request for new counsel.

THIRD ASSIGNMENT OF ERROR: The Prosecutor's misconduct denied the Appellant due process of law as guaranteed by the United States and Ohio Constitutions.

FOURTH ASSIGNMENT OF ERROR: The trial court abused its discretion when it instructed the jury on consciousness of guilt.

FIFTH ASSIGNMENT OF ERROR: The evidence at Appellant's trial was insufficient to support a conviction, and Appellant's conviction is against the manifest weight of the evidence.

SIXTH ASSIGNMENT OF ERROR: The Appellant was not afforded effective assistance of counsel as required by the United States and Ohio Constitutions.

SEVENTH ASSIGNMENT OF ERROR: The trial court abused its discretion when it allowed the admission of hearsay evidence over trial counsel's objection.

{¶ 2} In his first assignment of error, appellant argues he was denied his right to counsel as guaranteed by the United States and Ohio Constitutions when the court did not grant his request for new counsel.

{¶ 3} Appellant initially retained counsel the day after he was arraigned. Several months later, the court permitted that attorney to withdraw and the court appointed new counsel to represent appellant. A week prior to trial, the court appointed new counsel to represent appellant, but there is no record of the prior counsel being permitted to withdraw.

{¶ 4} On the morning of trial, appellant orally requested a pretrial in chambers to present his request for the appointment of additional counsel. Appellant's appointed counsel also moved for appointment of co-counsel to serve as second chair, and the court granted the request. The court discussed with appellant the potential sentences he faced and noted that trial had already been delayed several times because appellant wanted to retain private counsel. The court noted appellant's appointed counsel continued to work the case even while appellant sought private counsel, the current appointed counsel never hesitated to ask for continuances if he needed additional time, he has capable co-counsel, he indicated that he was prepared to go to trial, and he had been speaking to appellant on a regular basis. Appellant's appointed counsel stated that he frequently spoke with appellant and they had a good relationship until appointed counsel rendered the opinion appellant should accept the plea offer. While appointed counsel did not believe the plea

offer was a great deal, it was at least three years less than the potential minimum sentence which could be imposed upon conviction.

{¶ 5} After informing appellant that the court would not find there had been a miscarriage of representation, the court gave appellant additional time to consult with his appointed counsel. Appellant refused to speak with his appointed counsel asserting that he had never explained how he was going to present the case. At that point, appellant's appointed counsel explained his opinion to accept the plea was solely based upon his legal responsibility to appellant. He promised to represent appellant zealously whatever he decided to do. The court explained that trials do not progress as they do on television because it would not be known until trial how the witnesses would testify and there was no overriding case law that would save the day.

{¶ 6} The right to appointed counsel entitles a defendant to competent, effective legal representation, not the counsel of the defendant's choice or an attorney with whom the defendant can have a harmonious relationship. *Morris v. Slappy*, 461 U.S. 1, 13-14, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983). When faced with a timely, good faith motion to appoint new counsel, the trial court must determine the reasons for defendant's dissatisfaction with his current counsel. *U.S. v. Iles*, 906 F. 2d 1122, 1130 (6th Cir.1990). The defendant must also show good cause for substituting new counsel. *Id.*

{¶ 7} The fact that counsel gave his opinion regarding the strength of the defendant's case or whether the defendant should accept a plea reflects a fulfillment of the duty of appointed counsel, whether the accused wants to hear it or not. *State v.*

Cowans, 87 Ohio St.3d 68, 73, 717 N.E.2d 298 (1999). The defendant is entitled to new appointed counsel on constitutional grounds only upon a showing that there is a "conflict of interest, a cessation of communication, or an irreconcilable conflict which would jeopardize the defendant's right to effective assistance of counsel and lead to an unjust verdict." *State v. Love*, 6th Dist. No. L-96-156, 1997 WL 133329, *4 (Mar. 21, 1997). *See also Glasser v. U.S.*, 315 U.S. 60, 76, 62 S.Ct. 457, 86 L.Ed. 680 (1942), *superseded by rule on other grounds as stated in Bourjaily v. U.S.*, 483 U.S. 171, 181, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987); *State v. Coleman*, 37 Ohio St.3d 286, 292, 525 N.E.2d 792 (1988); *State v. Pruitt*, 18 Ohio App.3d 50, 57, 480 N.E.2d 499 (Mar. 21, 1984); and *State v. Nickelson*, 6th Dist. No. WD-06-023, 2007-Ohio-6367, ¶ 42. If there is no Sixth Amendment violation, substitution of counsel is solely within the discretion of the trial court. *United States v. Calabro*, 467 F.2d 973, 986 (2d Cir.1972).

{¶ 8} On appeal, appellant argues that there was no relationship between appellant and his appointed counsel because appellant did not even know what kind of defense his appointed counsel intended to use. We find appellant's arguments are unsupported by the record. Appellant's counsel indicated that he had discussed the case with appellant. Appellant was given time to obtain retained counsel. Appellant had cooperated with his appointed counsel until he advised appellant to accept the plea offer. On the morning of trial, appellant's counsel assured appellant that counsel would work zealously to defend him if he chose to go to trial. The judge concluded that appellant was actually upset because the day of trial had finally come. We agree with the trial judge that this was not

a type of case where there was any unique defense other than to ensure the prosecution established its case. We find there was no constitutional deprivation of appellant's right to effective assistance. Appellant's first assignment of error is not well-taken.

{¶ 9} In his second assignment of error, appellant argues that the trial court abused its discretion in denying appellant's request for new counsel.

{¶ 10} We review the decision of the trial court denying substitution of appointed counsel under an abuse of discretion standard. *State v. Murphy*, 91 Ohio St.3d 516, 523, 747 N.E.2d 765 (2001). An abuse of discretion is more than a mere error in judgment; it suggests that a decision is unreasonable, arbitrary, or unconscionable. *State v. Adams*, 62 Ohio St.2d 151, 157-58, 404 N.E.2d 144 (1980).

{¶ 11} We find that the trial court did not abuse its discretion by denying the motion. Appellant's second assignment of error is found not well-taken.

{¶ 12} In his third assignment of error, appellant argues the prosecutor's comments during opening and closing arguments constituted misconduct and denied appellant due process of law as guaranteed by the United States and Ohio Constitutions.

{¶ 13} No objections were made to any of these comments. Therefore, appellant may claim only plain error on appeal and must demonstrate the remarks denied him a fair trial. *State v. Wade*, 53 Ohio St.2d 182, 373 N.E.2d 1244 (1978), paragraph one of the syllabus, *certiorari granted and judgment vacated on other grounds* (1978), 438 U.S. 911, 98 S.Ct. 3138, 57 L.Ed.2d 1157. *See also* Crim.R. 52(B). A finding of plain error is made only in exceptional cases to prevent a manifest miscarriage of justice. *State v.*

Long, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus. We must determine whether the statements constitute misconduct and, if so, whether the prosecutor's actions or comments prejudicially affected appellant's substantial rights. *State v. Thomas*, 97 Ohio St.3d 309, 2002-Ohio-6624, 779 N.E.2d 1017, ¶ 59. However, a trial will not be deemed "unfair if, in the context of the entire trial, it appears clear beyond a reasonable doubt that the jury would have found the defendant guilty even without the improper comments." *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, 767 N.E.2d 166, ¶ 121.

{¶ 14} During opening arguments, the prosecution is given wide latitude to "inform the jury in a concise and orderly way of the nature of the case and the questions involved, and to outline the facts intended to be proved." *Maggio v. Cleveland*, 151 Ohio St. 136, 84 N.E.2d 912 (1949), paragraphs one and two of the syllabus. While it is not permissible for a prosecutor to vouch for the credibility of a witness, *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, 836 N.E.2d 1173, ¶ 117, a prosecutor can argue the jury should find a witness credible if this conclusion is based on reasonable inferences the jury could draw from the evidence. *Id.*

{¶ 15} Appellant contends that the following statements by the prosecutor during opening statements constitute misconduct: "Do we ease you into it or do we present you with the facts and it is what it is. We don't make these facts up." Appellant argues that the prosecutor was attempting to influence the jury to accept the testimony of the state's

witnesses as the ultimate facts because it would be impossible for anyone to make up their testimony.

{¶ 16} Appellee argues that the comment made during opening statements was nothing more than the prosecutor's description of the difficult role he faced in presenting the evidence in this case where the evidence involved testimony of the obscene and offensive words that passed between appellant and the victim. We agree. We find the prosecutor's statement was nothing more than presenting a logical conclusion about the testimony based on the evidence presented.

{¶ 17} During closing arguments, the prosecution may make fair comments on the evidence and reasonable inferences that the jury could draw from the evidence. *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 162.

{¶ 18} In this case, the prosecutor began his closing argument by reminding the jury that they had the duty to assess the credibility of the witnesses and that the prosecutor believed the jury would conclude that appellant was guilty. The prosecutor then proceeded to review each witness's testimony and concluded by stating: "I believe that testimony was very credible. * * * I submit to you that is very credible when you are caught in that type of situation. * * * and again I believe the same exchange * * *." Finally, the prosecutor stated the witnesses "came in here, swore an oath and told you the truth."

{¶ 19} The prosecutor's statements standing alone reflect his opinion of the credibility of the witness which would be improper. However, when the entire argument

is taken as a whole, we find the prosecutor clearly reminds the jury that it is their role to determine the credibility and his comments are an argument that the jury will be able to reach the conclusion of credibility based upon the evidence the prosecutor summarized. The last statement was made in response to the defense's closing arguments and was part of the prosecutor's argument that the three witnesses did not conspire to present a specific story. Instead, they each took an oath and testified to what they had seen.

{¶ 20} Finally, appellant argues the prosecutor commented on appellant's defense strategy by stating that it was illogical, appellant had no defense, appellant was "guilty as the day is long," and that the prosecutor did not know why appellant chose to go to trial.

{¶ 21} Comments that degrade defense counsel for doing his job inherently denigrate the defendant and are improper. *State v. Getsy*, 84 Ohio St.3d 180, 194, 702 N.E.2d 866 (1998). Likewise, comments that attack the defendant for asserting his constitutional rights would be improper. *State v. Fears*, 86 Ohio St.3d 329, 334-336, 715 N.E.2d 136 (1999).

{¶ 22} In this case, the prosecutor argued to the jury that although the witness testimony was conflicting, this case was not as complicated as the defense was implying. The prosecutor also noted that the fact that appellant exercised his right to a trial did not imply that this was a complicated or close case. He stated that his was a simple case and there was no defense because appellant was guilty. We conclude that these comments are within the bounds of fair closing argument.

{¶ 23} Taken as a whole, there was no unfair or derogatory impact upon appellant. However, even if we were to find any of the above comments unacceptable, there is sufficient evidence of guilt in this case that any error arising from these statements would have been harmless. It is clear beyond a reasonable doubt the jury would have found appellant guilty even if the jury had not heard the improper comments.

{¶ 24} Appellant's third assignment of error is not well-taken.

{¶ 25} Because appellant's sixth assignment of error is related to the third assignment of error, we address it out of order. In his sixth assignment of error, appellant argues he was denied effective assistance of counsel because his counsel did not object to statements by the prosecutor during opening and closing arguments.

{¶ 26} In order to establish ineffective assistance of counsel, appellant must first demonstrate there was a substantial violation of the attorney's duty to his client. *Strickland v. Washington*, 466 U.S. 668, 687-689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and *State v. Lott*, 51 Ohio St.3d 160, 174, 555 N.E.2d 293 (1990). Because we have found that none of the statements by the prosecutor were improper, we find that his counsel did not render ineffective assistance by failing to object to the statements. Appellant's sixth assignment of error is not well-taken.

{¶ 27} In his fourth assignment of error, appellant argues that the trial court abused its discretion by overruling appellant's objection and instructing the jury on the consciousness of guilt.

{¶ 28} The judge is required to instruct the jury on "all matters of law necessary for the information of the jury in giving its verdict." R.C. 2945.11. The determination of the necessary jury instructions to be given which were warranted by the evidence is left to the sound discretion of the court. *Murphy v. Carrollton Mfg. Co.*, 61 Ohio St.3d 585, 591, 575 N.E.2d 828 (1991), citing *Riley v. Cincinnati*, 46 Ohio St.2d 287, 297, 348 N.E.2d 135 (1976). On appeal, the court's determination of what instructions to include will be reviewed under an abuse of discretion standard; i.e., whether the trial court's decision was unreasonable, arbitrary, or unconscionable. *State v. Wolons*, 44 Ohio St.3d 64, 68, 541 N.E.2d 443 (1989), and *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 29} Evidence of appellant's flight after a crime alone does not raise a presumption of guilt; but unless satisfactorily explained, evidence of flight can be used as circumstantial evidence of consciousness of guilt or a guilty connection with the crime. *State v. Taylor*, 78 Ohio St.3d 15, 27, 676 N.E.2d 82 (1997), and *State v. Eaton*, 19 Ohio St.2d 145, 160, 249 N.E.2d 897 (1969), paragraph six of the syllabus, *vacated in part on other grounds*, 408 U.S. 935, 92 S.Ct. 2857, 33 L.Ed.2d 750 (1972). A jury instruction on consciousness of guilt is appropriate when the record contains evidence from which reasonable minds might reach the conclusion sought by the instruction. *See Feterle v. Huettner*, 28 Ohio St.2d 54, 55-56, 275 N.E.2d 340 (1971).

{¶ 30} Appellant contends that this instruction is improper when there is no evidence that appellant was chased after the shooting or escaped from custody. We

disagree. There was evidence that appellant was seen at the scene shooting the victim, was seen running away, took refuge in the home of an acquaintance until his father arrived, and remained at large until he surrendered himself to the police the next day. This evidence was sufficient to warrant a jury instruction that appellant's actions reflected a consciousness of guilt. Appellant has failed to demonstrate that the trial court abused its discretion. Appellant's fourth assignment of error is found not well-taken.

{¶ 31} In his fifth assignment of error, appellant argues that his conviction was not supported by sufficient evidence and was contrary to the manifest weight of the evidence. The following evidence was admitted at trial.

{¶ 32} On April 24, 2011, at 10:53 p.m., Toledo police officers Sergeant Smith and Officer Phalen, responded to a call in the 1300 block of Grand Street, Toledo, Ohio, arriving within minutes.

{¶ 33} Sergeant Smith testified he was assigned to work the area near Grand Street on the night of the shooting and was the first officer to respond to the call. The officer had worked the area for 13-to-14 years and knew that there was gang activity in the area so gunshots were not unusual. He recalled it was very dark on Grand Street and raining heavily when he arrived on the scene. When he turned the corner onto Grand Street, the area was very dark and he did not see anything at first. As he drove closer, he saw someone at the end of the street waving their arms, a crowd gathering, and a person lying in the street. The victim lying in an area where the lighting was better, perhaps from the porch lights, and the officer saw people moving around. The victim was lying face up

and appeared to have already been deceased. Sergeant Smith immediately began to clear the area and set up a barrier to keep people away. People were making comments to him about what had happened. He was notified where the suspect lived across the street, so the officers secured the house as well.

{¶ 34} Officer Phalen also testified it was a dark, cool evening and it was raining. Officer Phalen could not recall where a streetlight was located. When he arrived, he saw a young man, later identified as Darren Smith, lying in the street behind a car parked at the curb. Smith had been shot in the torso. The officer helped set up a crime scene border. At first, there were 6-to-8 people on a porch; but shortly after they arrived, Officer Phalen saw the crowd swell to 30-to-50 people, who were highly agitated and wanted to find out what was going to be done. The fire department was called to treat Smith. Another officer, Officer Bunting, went with the victim to the hospital while Officer Phalen remained at the scene.

{¶ 35} Officer Phalen testified he was approached by a man who claimed to know who had shot Smith. Phalen later learned that this man was Michael Taylor, Jr., appellant's father. The officer secured the home where appellant had been just prior to the shooting and gathered information to turn over to the detective. Officer Bunting testified that the victim was pronounced dead at the hospital. The officer remained with the victim's clothing until the scientific investigation detectives arrived to collect it.

{¶ 36} Shawn Crossland, who had a prior felony conviction for possession of crack cocaine, testified Smith was his cousin and they were together that evening. They

had been at Mark Overton's house that night on Grand Street. Six friends were playing dominos and drinking. Crossland heard two gunshots and they all went outside. Crossland saw a group of people across the street. Crossland heard Smith tell appellant to stop shooting and the two argued back and forth. Crossland went back into the house while Smith and appellant continued arguing. Crossland did not see Smith with a gun or knife that evening. After speaking with his cousin, DeQuane Roscoe, Crossland ran back outside and found Smith lying in the street behind Roscoe's car and gasping for air. While Crossland did not know who had shot Smith, he told the 911 operator that the shooter had jumped into a car because that is what others were telling him at the time.

{¶ 37} Roscoe testified he was present at the time of the shooting. He testified he had two prior felony convictions for drug possession and giving false information to the police, and pending charges for burglary which occurred after the shooting. He testified he was related to Smith by marriage. Roscoe testified he arrived at the home of his uncle, Overton, about 30 minutes before the shooting and parked in front of Overton's home. Roscoe knew of appellant and saw him at his house, but they had not met before. Roscoe knew that appellant and Smith were friends. Roscoe went inside and saw Smith and others playing cards and talking. Roscoe did not observe Smith and appellant's argument. Ten-to-twenty minutes later, Roscoe went outside and saw Smith on the porch.

{¶ 38} Roscoe asked Smith to help him with the trunk of the car because it was jammed. Smith came off the porch toward the front of the car calling out appellant with

an expletive. Appellant responded by saying Smith was the expletive and then shot Smith. Roscoe did not see appellant with the gun but heard him shoot at an arms-length distance from Smith. Afterward, Smith punched appellant and ran toward the rear of the car. Roscoe heard four to six more shots and saw Smith fall near the back of the car. Roscoe could not recall if appellant shot Smith after he fell. Roscoe saw appellant take off running with the gun in his hand. Roscoe went to Smith and heard him gasping for air but Roscoe did not see any blood. Roscoe ran into the house to get the others who ran back out with him. Roscoe thought it took the police 20-to-30 minutes to arrive. Later that night, Roscoe spoke with a detective and picked appellant out of a photographic array.

{¶ 39} J.D., a minor who was 14 years old at the time of the crime, testified that she met Smith in March 2011, while visiting J.J., a friend who lived a block away from Grand Street. She was visiting J.J. on the night Smith was killed. J.D. and J.J. had been at Overton's house earlier in the evening, sometime between 5:00 p.m. and 7:00 p.m., and stayed about 10-to-20 minutes. The two went on to another friend's house and then returned to Overton's house around 8:00 p.m. or 9:00 p.m. J.D. saw Smith sitting on the porch and talked to him awhile. J.D. thought of Smith like a big brother after having known him for a couple of months. She visited Smith frequently on the weekends, but she also went to appellant's house as well.

{¶ 40} During J.D.'s second visit, appellant walked by the house with two others and Smith identified appellant as "man." J.D. knew appellant in the sense that she would

hang out at his house after school and on the weekends and knew that appellant lived there.

{¶ 41} J.D. further testified that she and J.J. left Smith and went to appellant's house. J.D. saw appellant sitting on the couch with a long silver gun and he appeared to be mad and upset. After about five minutes, appellant got up and went outside with two others, appellant's younger brother Montell, and Christian Jackson. All three had been drinking. While they were outside, J.D. heard six gunshots. When J.D. looked out the window, she saw all three of them shooting the gun. All the men had been drinking. J.D. went outside onto the porch and saw Smith come out and yell to stop shooting because there were still kids outside. Smith and appellant exchanged insults. Appellant went back inside and J.D. remained on the porch with Montell and Christian.

{¶ 42} J.D. testified there was sufficient lighting from a streetlight in the area for everyone to see across the street even though it was a dark night and the rain did not start until after the shooting. J.D. testified that others were on the porch with her.

{¶ 43} After appellant went back into his house, J.D. heard Smith call appellant a derogatory name. When appellant understood that Smith was directing his name-calling at appellant, he went back outside and Smith and appellant continued with the name-calling. Smith asked appellant why he had a gun and told appellant to put it down. J.D. next saw a green car pull up and appellant spoke briefly to the three males in the car. After the car drove away, appellant continued to walk across the street. He ran up on the sidewalk and shot Smith while he stood behind a car parked at the curb. Smith ran and

ducked behind the car, but appellant chased Smith around the car and shot him calling Smith the derogatory name. Appellant shot Smith twice while he was on the ground. Then appellant ran off with a long, silver gun in his hand toward Sylvan Street. J.D. ran to help Smith who was in and out of consciousness. J.D. did not know Roscoe and had not seen him outside near the car that night.

{¶ 44} After the police arrived, J.D. went downtown with a detective to give a statement. That night J.D. told the police she had been in the house and did not see anything. She testified at trial that she had lied to the police that night because she had never been involved in such a situation before and feared that she would be in danger if she came forward as a witness. While she knew there was a lot of gang activity in this area, J.D. had never heard gunshots before. The next day she told her mother what happened and her mother told J.D. to report what she had seen to the police. She believed that her mother called the police because on June 12, a detective came to her house and showed a photo array from which J.D. identified appellant.

{¶ 45} J.D.'s friend, J.J., testified she had met Smith about a month before his death and had met appellant through Smith. She also testified that she and J.D. had been to a barbecue that evening and returned to the home of Smith's cousin, Overton. They spoke to Smith for a couple of minutes before J.J. left by herself to go across the street to appellant's house. J.D. joined her about half an hour later. J.J. noticed appellant sitting in the living room with a long, silver gun on his lap. She recalled appellant left the house, but she did not hear gunshots until a couple of hours later. After hearing the shots,

she ran out on the porch and saw a lot of people standing across the street. There was no one on the porch with her. She saw Smith on the ground and appellant running away with the same gun in his hand toward his home through the alley. She did not see him run toward Sylvan Street.

{¶ 46} She also did not tell the police what she had seen that night because she was afraid of what would happen to her. She decided to tell the truth eight months later.

{¶ 47} Kevin Korsog, the supervising detective, testified he arrived at the scene in an unmarked car after other officers. The street was very crowded and it was dark and raining. A crowd charged at his car when he first arrived because they did not know who he was. In the beginning, there did not appear to be any knowledge of who the perpetrator was. He located potential witnesses and separated them until their statements could be taken. After interviewing the witnesses, the officers were able to identify appellant as a suspect. At 3:00 a.m., Detective Korsog received a telephone call from the victim's mother. She gave the detective a location where appellant could be found about a block away, which was at Oscar Kynard's house.

{¶ 48} Kynard testified he knew of appellant through his father and grandmother. On the night of the shooting, Kynard recalled appellant had come to Kynard's home around 9:00 p.m. when it was dark outside. Kynard's home is located around the corner from Grand Street about a block away. Appellant's visit was unusual because he had never been to Kynard's home before. Appellant used the telephone to call his father. Kynard's son, Oscar Kynard, Jr., came home 30-to-45 minutes later. Kynard overheard

his son and appellant talking and heard appellant say something like, "You know D, he ain't here no more." Kynard did not know who was "D." Approximately 30 minutes later, appellant's father came to pick up appellant and they left.

{¶ 49} Oscar Kynard, Jr. testified he knew appellant's father from school but did not socialize with appellant. Kynard had returned home around 10:00 p.m. or 10:30 p.m. on April 24, 2010, and found appellant at his home. As he approached the front door he was concerned because it was ajar and he had seen police on Grand Street. His father explained that his little cousin Earl was using the telephone. Kynard explained to his father that it was not Earl but appellant who was using the telephone. Kynard, Jr. and appellant talked for a short time. Appellant told Kynard, Jr.: "I got in to it pretty much with little D and really he ain't no more." Kynard, Jr. did not realize what appellant was saying and did not connect it to the commotion he had seen on Grand Street. Appellant was very calm. After appellant left about half an hour to 45 minutes later with his father, Kynard, Jr. went to Grand Street to find out what had happened. Kynard, Jr. knew of "little D" and thought he kept to himself. Kynard, Jr. saw appellant's father talking to Smith's father as Kynard, Jr. approached and then appellant's father walked away. When Smith's father saw Kynard, Jr. Smith's father talked to Kynard, Jr. about what had happened.

{¶ 50} Jeffery Clark, a Toledo police detective, testified he arrived on the scene about an hour after the shooting and the area was fairly quiet. The other detectives had already identified appellant as a suspect after talking to appellant's father. Appellant

turned himself in the next day. Appellant admitted to Detective Clark that appellant was at the scene and had argued with Smith, but appellant denied shooting Smith. Appellant gave two different accounts of his observations of the shooting and stated he ran away because he was afraid they would come after him also. In one account, the shooter got out of a white car that pulled in front of Smith's house. In another account, the shooter was near a parked car. The detective testified the gun used to shoot Smith was never located.

{¶ 51} The detective monitored appellant's telephone calls from the jail. On April 27, 2010, appellant's telephone call was recorded wherein appellant complained of how Smith talked to him and treated him inappropriately. Also during the call, appellant's girlfriend expressed her fears about retaliation. Since this time, the detective testified, several houses on Grand Street have burned, some are boarded up, and some have been torn down. Appellant's younger brother was murdered in that general area on June 10, 2011. However, the detective had no basis upon which to connect these events with appellant or Smith's murder.

{¶ 52} Maneesha Pandey, the deputy coroner, testified Smith suffered four gunshot wounds. After her examination, Pandey concluded the bullet wound to the left side of Smith's neck was made from a range of at least a few feet away because there was no soot, stippling marks caused by gun powder, or gun powder found at the wound site. The shot entered the neck and struck Smith's aorta, right subclavian artery, and lung. She opined this wound would have caused Smith's death within seconds to minutes. The

bullet wound to his abdomen included stippling and multiple punctate abrasions. Based on her examination, she concluded that this wound was caused by a gun fired within at least a few inches of Smith because the bullet caused the stippling on his skin after passing through three layers of clothing. This bullet hit Smith's major abdominal blood vessel and kidney before fragmenting, and one of the fragments lodged in his heart. She opined this wound would have caused Smith's death within a few minutes. The remaining two bullet wounds were not life threatening. Pandey also determined that Smith had a blood alcohol of .08 percent, or the legal limit for driving purposes.

{¶ 53} A challenge to the sufficiency of the evidence is a question of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). The standard for determining whether there is sufficient evidence to support a conviction is whether the evidence admitted at trial, "if believed, would convince the average mind of defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus, *superseded by constitutional amendment on other grounds as stated in State v. Smith*, 80 Ohio St.3d 89, 103, 684 N.E.2d 668 (1997) fn. 4, citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.E.2d 560 (1979). *See also Thompkins*. Therefore, "[t]he verdict will not be disturbed unless the appellate court finds that reasonable minds could not reach the conclusion reached by the trier-of-fact." *State v. Dennis*, 79 Ohio St.3d

421, 430, 683 N.E.2d 1096 (1997), citing *Jenks* at paragraph two of the syllabus. In determining whether the evidence is sufficient to support the conviction, the appellate court does not weigh the evidence nor assess the credibility of the witnesses. *State v. Walker*, 55 Ohio St.2d 208, 212, 378 N.E.2d 1049 (1978), and *State v. Willard*, 144 Ohio App.3d 767, 777-778, 761 N.E.2d 688 (10th Dist.2001). But, the court must view the evidence in the light most favorable to the prosecution. *Jenks, supra*. If the state "relies on circumstantial evidence to prove an element of the offense charged, there is no requirement that the evidence must be irreconcilable with any reasonable theory of innocence in order to support a conviction[.]" so long as the jury is properly instructed as to the burden of proof, i.e., beyond a reasonable doubt. *Jenks* at paragraph one of the syllabus.

{¶ 54} Appellant was charged with murder, with a firearm specification. Therefore, the state was required to prove that appellant: "cause[d] the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of section 2903.03 or 2903.04 of the Revised Code." R.C. 2903.02(B).

{¶ 55} Furthermore, the state was required to prove that appellant committed the offense with a firearm. R.C. 2941.145.

{¶ 56} Appellant argues that the witness testimony was too inconsistent to support a conviction. Appellant's argument addresses the issue of credibility and weight of the evidence, not the issue of sufficiency. The prosecution presented eyewitness testimony

and circumstantial evidence (by way of appellant's actions after the shooting), which, if believed, would establish beyond a reasonable doubt that appellant shot Smith. Therefore, we find there was sufficient evidence presented to support the conviction.

{¶ 57} Even when there is sufficient evidence to support the verdict, a court of appeals may decide that the verdict is against the weight of the evidence. *Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541, paragraph two of the syllabus. When weighing the evidence, the court of appeals must consider whether the evidence in a case is conflicting or where reasonable minds might differ as to the inferences to be drawn from it, consider the weight of the evidence, and consider the credibility of the witnesses to determine if the jury clearly "lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Id.* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983) and *Smith*, 80 Ohio St.3d 89, 114, 684 N.E.2d 668.

{¶ 58} Upon an examination of all of the evidence, we find that the conviction was not contrary to the manifest weight of the evidence. All of the witnesses testified that appellant and Smith were "friends," they had been arguing before the shooting, and the shooting was precipitated by Smith calling appellant a derogatory name. Appellant also told Detective Clark that appellant and Smith had been arguing that night. Appellant also stated in his telephone call from jail that he did not tolerate being talked to the way Smith had done that night. The two young girls who testified agreed that appellant had a gun with him while he was arguing with Smith and that appellant's demeanor was angry and

upset. Those who saw appellant shoot Smith all testified that he fled on foot, although they disagreed as to whether he was running toward the intersection or an alley. Crossland told the emergency operator that the perpetrator had fled in a car, but he testified that he made this statement based on what others had told him. Finally, the Kynards testified that appellant told them calmly that he "got in to it" with Smith and he was dead.

{¶ 59} There are some variations in the witness testimony in this case. Crossland testified that he was inside when he heard shots fired and Roscoe came running inside. Roscoe testified that he was outside beside his car when appellant shot Smith and saw appellant flee on foot with the gun. Roscoe did not see a second car.

{¶ 60} Their testimonies conflicted with the two young girls who initially denied having witnessed the shootings and did not come forward with their statements until months later. J.D. never saw Roscoe outside near the car and she alone testified that appellant spoke to some men in a car that pulled up next to the curb shortly before crossing the street to shoot Smith. J.J. testified only that she saw appellant running away with the gun after she saw Smith on the ground. J.J. said she was alone on the porch and J.D. testified that she ran to Smith's aid after the shooting.

{¶ 61} While appellant attempts to characterize these discrepancies as inconsistencies, we disagree. The fact that each witness only saw a portion of the events is consistent with normal witness observations. Not every witness will see the same things happening even if they witness the same event. These witnesses did agree on the

essential elements of the crime: appellant had a gun that evening and shot Smith. Furthermore, appellant fled to a nearby house after the shooting and could not be located for the remainder of the night. Appellant also made statements to others implicating himself as the shooter. When all of the evidence is considered as a whole, we find that the jury did not lose its way in evaluating the evidence. Therefore, we find that appellant's conviction was not contrary to the manifest weight of the evidence.

{¶ 62} Appellant's fifth assignment of error is not well-taken.

{¶ 63} In his seventh assignment of error, appellant argues the trial court erred by admitting hearsay evidence over appellant's objections.

{¶ 64} Evid.R. 801(C) defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay is not admissible unless an exception to the general rule applies. Evid.R. 802.

{¶ 65} Appellant argues the court should not have admitted J.D.'s testimony concerning the specific statements Smith made while arguing with appellant. Appellant asserts such evidence was used to establish a motive for the shooting. The trial court initially overruled appellant's objections finding that the statements were not hearsay because they were not offered for the truth of the matter asserted pursuant to Evid.R. 801(C). However, later in the trial, the court reconsidered the issue of the admissibility of the statements under Evid.R. 803(3) and again overruled appellant's objections on the

basis that they reflected Smith's state of mind. Appellant argues that neither of these exceptions applied in this case and that the error was not harmless.

{¶ 66} Appellee argues that appellant had not objected to the admission of Smith's statements during Roscoe's testimony and, therefore waived the issue as to J.D.'s testimony. Furthermore, appellee argues that Smith's statements were not hearsay and even if the basis for allowing the evidence to be admitted was erroneous, the error did not require that appellant's conviction be overturned because it was harmless error.

{¶ 67} J.D. and Roscoe both testified as to the names Smith called appellant during their argument. The testimony was elicited to evidence the nature of the argument between the two men and not to prove the truth of the matter asserted. Therefore, the statements were not hearsay. While the jury did not need to know the exact words expressed to understand the nature of the argument, we find the testimony was not prejudicial to appellant. Furthermore, appellant's own statements to the police and his recorded telephone conversation evidenced that he and Smith argued that evening and that Smith made derogatory statements to appellant which angered him.

{¶ 68} J.D. further testified that Smith had asked appellant why he had a gun. This statement was hearsay. However, we find it was cumulative evidence and, therefore, not prejudicial, because three witnesses testified they had seen appellant with a gun that evening.

{¶ 69} Therefore, we find appellant's seventh assignment of error not well-taken.

{¶ 70} Having found that the trial court did not commit error prejudicial to appellant, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the court costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE