[Cite as *State v. Cooper*, 2014-Ohio-1294.]

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

State of Ohio — Court of Appeals No. L-12-1296

Appellee — Trial Court No. CR0201102847

v.

Paul Cooper — **DECISION AND JUDGMENT**

Appellant — Decided: March 28, 2014

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Brenda J. Majdalani, Assistant Prosecuting Attorney, for appellee.

Spiros P. Cocoves, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant appeals his murder conviction, entered on a jury verdict in the Lucas County Court of Common Pleas. Because we find no error in the testimony rendered and no prosecutorial misconduct, we affirm appellant's conviction. However, because the trial court failed to properly inform appellant at the sentencing hearing that it

was imposing prosecutorial costs and the court improperly merged allied offenses, we reverse and remand the matter to the court to remedy those defects.

{¶ 2} Shortly before midnight on October 26, 2011, a friend brought Michael Heidtman to the emergency room of a Toledo hospital. Heidtman had been shot. An autopsy later revealed that a single bullet had severed Heidtman's aorta and damaged several other vital organs. He was pronounced dead at 12:05 a.m. on October 27.

{¶ 3} The police investigation into Heidtman's death soon focused on a Lewis Avenue apartment where he had been "partying" earlier that evening. According to later trial testimony, Darnell Frison, his cousins, Michael Alexander and Eric Colter and Colter's girlfriend, Tamera Greene, were drinking and using rock cocaine at the Lewis Avenue apartment when Frison and Greene went out for more beer. While they were out, they encountered Heidtman, known to them as "White Mike."

{¶ 4} Frison later testified that White Mike asked him if Frison knew where he could purchase an "eight ball," slang for 3.5 grams of crack cocaine. Frison testified that he contacted appellant, Paul Michael Cooper. According to Frison, appellant agreed to meet Frison and Heidtman in the parking lot of a nearby Rite Aid store.

{¶ 5} Frison said appellant told him that he was reluctant to deal directly with Heidtman because appellant did not know him. Instead he asked Frison to be the intermediary. Frison testified that appellant gave him the drugs to make the exchange, but Heidtman seized them from him and ran. Frison's pursuit of Heidtman is partially captured on security video from the store.

{¶ 6} Off camera, Frison reported, he chased Heidtman for some distance, finally tackling him in the driveway of a nearby residence. Heidtman gave up the cocaine and, according to Frison, "walked away."

{¶ 7} Frison left his cell phone at the Lewis Avenue house. Sometime after Frison left for the Rite Aid meeting, Michael Alexander answered a call on Frison's phone. Alexander testified that he recognized appellant's voice. According to Alexander, appellant said "when [you] see [Frison] tell him I'm killing him."

{¶ 8} Alexander testified that, shortly after appellant's call, Heidtman appeared, looking for "his stuff." Pursued by Alexander and Colter, Heidtman left in a pick-up truck.

{¶ 9} A few moments later, security video from a residence across Lewis Avenue shows a figure with dark pants and a gray hoodie pacing on the sidewalk. Both Frison and Alexander identified the figure as appellant. A few minutes later, Frison arrived. At that point, according to Frison, he returned the drugs to appellant, but appellant believed Frison did not return all of the drugs. Audio from the security camera records someone demanding a set of scales. Frison and Alexander testified appellant had a gun. At this point, a truck pulled up and a shot can be heard. Frison and Alexander testified that appellant shot Heidtman through the window of the truck. The video shows the figure in the gray hoodie running from the scene.

{¶ 10} Frison, Alexander and the others in the Lewis Avenue apartment were questioned by police and, with some reluctance, named appellant as the shooter. On

November 14, 2011, the Lucas County Grand Jury handed down a two count indictment charging appellant with murder and, alternatively, felony murder, violations of R.C. 2903.03(A) and 2903.03(B) respectively. Firearm specifications accompanied both counts. Appellant pled not guilty and the matter proceeded to a trial before a jury.

{¶ 11} At trial, Frison and Alexander testified about the events leading up to Heidtman's shooting and identified appellant as the shooter. The security videos were admitted by stipulation. A deputy coroner testified that Heidtman's death was the result of a gunshot and that his body had cuts and bruises consistent with being tackled. One of appellant's neighbors testified that she had seen appellant leave his house earlier on the day of the shooting in a grey or silver hoodie and driving a blue Durango, a car consistent with that described by Frison.

{¶ 12} The only witness on behalf of appellant was a police officer from a neighboring city who is the brother of appellant's girlfriend. The officer testified that, at the time the shooting took place, he visited the apartment appellant shared with his sister. According to the officer, his sister told him that appellant was asleep upstairs. The officer also testified that the blue Durango witnesses described appellant driving that night belonged to the officer's sister and had been repossessed months earlier.

{¶ 13} The matter was submitted to the jury, which found appellant guilty of both counts and specifications. The trial court accepted the verdict, found appellant guilty and sentenced him to an indefinite term of 15 years to life in prison on each count. The court

also imposed a three-year term of incarceration for each firearm specification. The court ordered the sentences for each count to be served concurrently.

{¶ 14} From this judgment of conviction, appellant now brings this appeal. Appellant sets forth the following six assignments of error:

> I. The trial court erred to the prejudice of Mr. Cooper by permitting the state, through its witnesses, to bolster the credibility of its witnesses [sic] violation of his due process rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and the applicable portions of the Ohio Constitution.
>
> II. Trial counsel rendered ineffective assistance of counsel to Mr. Cooper by failing to object to the state's bolstering the credibility of its witnesses in violation of his right to a fair and reliable trial and his due process rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and the applicable portions of the Ohio Constitution.
>
> III. The trial court erred to the prejudice of Mr. Cooper when it ordered him to pay unspecified costs, including court appointed fees, without first determining the ability to pay those costs.
>
> IV. The trial court erred to the prejudice of Mr. Cooper by failing to merge counts 1 and 2 and further erred by imposing concurrent sentences on each of these counts.

V. Prosecutorial misconduct during the trial deprived Mr. Cooper of a fair and reliable trial or, in the alternative, trial counsel was ineffective in failing to object, both in violation of his rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Ohio Constitution.

VI. Cumulative errors deprive a criminal defendant and criminal appellant of a fair trial in violation of his rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Ohio Constitution.

I. Bolstering Credibility

{¶ 15} In his first assignment of error, appellant asserts that the trial court erred in permitting the police detective who investigated Michael Heidtman's murder to give testimony that appellant asserts improperly bolstered the testimony of witnesses Frison and Alexander's identification of appellant in the security videos. In his second assignment of error, appellant maintains that his trial counsel provided ineffective assistance of counsel by failing to object to the purportedly offending testimony.

{¶ 16} The failure to object to testimony during trial waives all but plain error on appeal. *State v. Zaciek*, 6th Dist. Ottawa No. OT-08-036, 2009-Ohio-383, ¶ 40. Plain error exists only if the error is obvious and, but for the error, the outcome of the trial would have been different. *State v. Gonzales*, 6th Dist. Wood No. 2014-Ohio-545, ¶ 48.

Thus, to prevail on his first assignment of error, appellant must show obvious error in the admission of testimony and that, as a result, the verdict would have been different.

{¶ 17} In his second assignment of error, appellant asserts that trial counsel provided ineffective assistance of counsel in failing to object to the testimony of the detective. To establish ineffective assistance of counsel, appellant must show that trial counsel's performance was deficient and that this deficiency made the result of the trial unreliable. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Accord State v. Smith*, 17 Ohio St.3d 98, 100, 477 N.E.2d 1128 (1985).

{¶ 18} We must first determine whether the testimony appellant finds offensive was improper. Although, in his brief, appellant alludes to "improper questions and answers sprinkled in [the detective's] testimony," he cites only a single example.

{¶ 19} On direct examination, the detective was asked:

Q: Have you had the opportunity to view the security videos * * *?

A: Yes.

Q: How many times have you viewed these videos?

A: Several.

Q: If you were to view these videos, would you be able to determine at least from them who Eric Colter and Darnell Frison are in terms of the colors that they're wearing?

A: Well, I have viewed them and identified them so in my mind it's not a color thing, it's all combined in identification and clothing.

Q: All Right. If you're viewing the videos are you able to point out I know who that is, I know is, I know who that is?

A: I believe so.

[Video playing.]

Q: Who is that?

A: Just walking into the scene the way he did, I believe that's Eric Colter with the long - - because that is like a long tee shirt and dark pants.

* * *

Q: Do you know who the person is that is represented by that image in here?

A: To my belief it's Frison.

Q: All right. And this person that walked into the screen, do you know who that is?

A: To my belief, it's Mr. Cooper.

{¶ 20} The portion above in italics is the testimony appellant points to as improper. The remainder has been included to provide context.

{¶ 21} Citing *State v. Boston*, 46 Ohio St.3d 108, 545 N.E.2d 1220 (1989), and *State v. Stowers*, 81 Ohio St.3d 260, 690 N.E.2d 881 (1998), appellant insists that the detective's testimony improperly bolstered the testimony of other witnesses and usurped the jury's function as the trier of fact. The state responds that *Boston* and *Stowers* were

child sex abuse cases not applicable to the present case. The cases hold no more than that an expert may not testify to the veracity of a child declarant, the state maintains.

{¶ 22} In *Boston*, the wife in a contested divorce accused her husband of molesting the couple's two and one-half year-old daughter. The girl was found incompetent to testify, but statements she made to a pediatrician and a psychologist were allowed into evidence. Additionally, the pediatrician and psychologist were allowed to opine that the child was not fantasying nor had she been "programmed" to make those statements. Both experts testified that they found the child credible. Reversing Boston's conviction, the Ohio Supreme Court held: "An expert may not testify as to the expert's opinion of the veracity of the statements of a child declarant." *Boston* at syllabus.

{¶ 23} *Stowers* clarified *Boston*, holding that, while the *Boston* syllabus rule excluded expert testimony that offers an opinion as to the child's statements, "[i]t does not proscribe testimony which is additional support for the truth of the *facts testified to* by the child, or which assists the fact finder in assessing the child's veracity." (Emphasis in original.) *Stowers* at 263.

{¶ 24} The reality is that witnesses bolster the testimony of other witnesses all the time. That is how a case is built. While, as the state concedes, it is improper for a police officer to offer an opinion as to the truthfulness of another witness, *see State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, ¶ 122, a fair reading of the detective's testimony in this matter reveals that his testimony is a commentary on the evidence rather

than an opinion of any other witness's truthfulness. If the detective's analysis of the facts bolstered some other witness's credibility, there is no impropriety.

{¶ 25} Our analysis of the testimony appellant maintains should not have been admitted reveals no error, plain or otherwise, in its introduction. Absent error, trial counsel's failure to object cannot constitute ineffective assistance of counsel. Appellant's first and second assignments of error are not well-taken.

II. Costs

{¶ 26} In his third assignment of error, appellant asserts that the trial court improperly imposed the costs of supervision, confinement, assigned counsel and prosecution as part of his sentence. Appellant concedes that R.C. 2947.23 requires a sentencing court to include the cost of prosecution as a judgment against a criminal defendant without consideration of his or her ability to pay, *see State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, 817 N.E.2d 393, ¶ 8, but insists that other costs may be imposed only on a finding that the offender has an ability to pay. According to appellant, the court held no hearing on appellant's ability to pay and the record is devoid of other evidence that would support such a finding.

{¶ 27} The state notes that when imposing the cost of prosecution, pursuant to R.C. 2947.23, the sentencing court must advise the defendant at sentencing of the imposition of such costs. This is so the defendant has an opportunity to seek a waiver of the mandatory costs. *State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954, 926 N.E.2d 278, ¶ 22. The state concedes that appellant was not properly notified at the sentencing

hearing of the imposition of the cost of prosecution and recommends the matter be remanded to the trial court for the proper notification and an opportunity to seek a waiver.

{¶ 28} With respect to the rest of the costs imposed, the state maintains that appellant's admission that he receives Supplemental Security Income payments is sufficient to support an finding that he has, or will have, the ability to pay.

{¶ 29} R.C. 2929.18(A)(5)(a)(ii) provides that a sentencing court may impose as a financial sanction, "[a]ll or part of the costs of confinement * * * provided that the amount of reimbursement ordered under this division shall not exceed the total amount of reimbursement the offender is able to pay as determined at a hearing and shall not exceed the actual cost of the confinement * * *." However, "[b]efore imposing a financial sanction under [R.C. 2929.18], the court shall consider the offender's present and future ability to pay the amount of the sanction or fine." R.C. 2929.19(B)(6). We have held that, while a sentencing court is not required to hold a hearing when determining whether to impose a financial sanction under this provision, the record must contain some evidence that the court considered the offender's ability to pay such a sanction. *State v. Phillips*, 6th Dist. Fulton No. F-05-032, 2006-Ohio-4135, ¶ 18, citing *State v. Lamonds*, 6th Dist. Lucas No. L-03-1100, 2005-Ohio-1219, ¶ 42.

{¶ 30} The recovery of appointed counsel fees is governed by R.C. 2941.51(D) which provides that such fees, "shall not be taxed as part of the costs and shall be paid by the county. However, if the person represented has, or reasonably may be expected to have, the means to meet some part of the cost of the services rendered to the person, the

person shall pay the county an amount that the person reasonably can be expected to pay." Again, no hearing on this matter is expressly required, but the court must enter a finding that the offender has the ability to pay and that determination must be supported by clear and convincing evidence of record. *State v. Knight*, 6th Dist. Sandusky No. S-05-007, 2006-Ohio-4807, ¶ 6-7.

{¶ 31} In this matter, the trial court found "[d]efendant to have, or reasonably may be expected to have, the means to pay for all or part of the applicable costs of supervision, confinement, assigned counsel, and prosecution as authorized by law." Appellant appears able-bodied. He claimed in his presentence interview to have a GED. There is nothing in the record to suggest that in 18 years, when he is first eligible for parole, he could not become gainfully employed. Accordingly, appellant's third assignment of error with respect to notification of the imposition of prosecutorial costs is well-taken. The remainder of appellant's arguments under this assignment of error are not well-taken.

III. Merger

{¶ 32} Appellant, in his fourth assignment of error, insists that the trial court erred when it failed to merge the alternatively charged murder and felony murder counts.

{¶ 33} R.C. 2941.25 provides:

> (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or

information may contain counts for all such offenses, but the defendant may be convicted of only one.

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

{¶ 34} To determine whether offenses charged are subject to merger, the court must first determine "whether it is possible to commit one offense and commit the other with the same conduct * * *." *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, ¶ 48. If multiple offenses can be committed by the same conduct, the next step is to determine whether the offenses were committed by the same conduct. *Id.* at ¶ 49. If the answer to both phases of the inquiry is yes, the offenses will be merged. *Id.* at ¶ 50.

{¶ 35} In this matter, the state concedes that there was one act and one victim underlying both counts of the indictment, so they must merge. We have held that concurrent sentences in lieu of merger to a single offense is not a sufficient alternative. *State v. Alcala*, 6th Dist. Sandusky No. S-11-026, 2012-Ohio-4318, ¶ 40. Consequently, appellant was prejudiced by this error. Appellant's fourth assignment of error is well-taken.

IV. Prosecutorial Misconduct

{¶ 36} In his fifth assignment of error, appellant suggests that during the trial the prosecution "engaged in a pattern of misconduct that began during voir dire and continued through closing argument." Despite the breadth of this accusation, appellant limits his examples of such misconduct to three statements by the prosecutor during closing argument.

{¶ 37} In the first statement of which appellant complains, the prosecutor states that the only real issue in the case is the identity of the shooter:

> We would first respectfully submit to you that you've seen a number of videos. You've watched the screen. You've heard different things on that video and ladies and gentlemen, we do not hesitate telling you that if the sole piece of evidence in this case was the videos that you watched, Paul Cooper would not be sitting there, would not have been sitting there charged with murder and you would not have sat here for the past couple of days pending decision with respect to two charges of murder.

{¶ 38} The prosecutor conceded that the quality of the video is such that it is difficult to identify faces or much more than specific items of clothing. The videos, however, are only part of a package, the prosecutor continued.

> There are two eyewitnesses in this case. You met them. Michael Alexander and Darnell Frison. They are not, we would submit to you, two people you would want to invite home to Sunday dinner with your family.

You may not like their lifestyle. You may not like what they stand for. You might not like what they're into on a day-to-day basis or what their lives have been like. But that doesn't mean they're unreliable and not believable.

{¶ 39} These statements taken together, appellant maintains, implies that the prosecutor is vouching for the veracity of the state's witnesses.

{¶ 40} Appellant also complains of a remark by the prosecution in its final closing argument:

The late great Marvin Gaye once said believe nothing of what you hear and only half of what you see. Counsel's argument somehow prompted that in my head.

{¶ 41} This statement, appellant suggests, constitutes improper disparagement of defense counsel's argument and "implies that while the defense has been zealous – the State is honest and ethical." According to appellant, these statements, taken together, constitute prejudicial prosecutorial misconduct. Moreover, or perhaps alternatively, since appellant's trial counsel failed to object to these purportedly improper remarks, she is guilty of providing ineffective assistance of counsel.

{¶ 42} 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 that the jury should find a witness credible if this conclusion is based on reasonable inferences the jury could draw from the evidence. *Id.* The first

statement to which appellant directs our attention appears to be nothing more than a recognition that the video evidence introduced is of poor quality and not dispositive of the identification of the shooter. We find nothing improper in the first statement.

{¶ 43} The second statement is a variation on a theme seen in most trials in which a witness with a questionable persona testifies. Generally, responding to defense counsel's attacks on a witness's credibility, the prosecutor points out that the witness is reliable and has no reason to lie. The argument at issue here was in response to a defense attack of the witnesses' credibility and referred to facts in evidence tending to make the witness more credible. This is not improper vouching. *Id.* at ¶ 120.

{¶ 44} With respect to the final comment appellant finds offensive, in rare instances egregious prosecutorial misconduct may constitute reversible error. *State v. Keenan*, 66 Ohio St.3d 402, 405, 613 N.E.2d 203 (1993). Comments that disparage defense counsel in the jury's presence are improper. The prosecutor represents the state and his or her comments carry the prestige of the state to a jury. Thus, "improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." *Id.* at 406, quoting *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). In *Keenan*, the court found a prosecutorial comment that defense counsel was "paid to get [the defendant] off the hook," derisive behavior toward defense counsel and a plethora of other infractions was reversible error.

{¶ 45} In our view, here the prosecutor's Marvin Gaye quote is at worst a gentle jab at the defense's argument. Such a comment does not amount to the type of pervasive misconduct necessary to constitute reversible error. *See State v. Getsy*, 84 Ohio St.3d 180, 194, 702 N.E.2d 866 (1998).

{¶ 46} Concerning appellant's argument that trial counsel's failure to object to these remarks was ineffective assistance of counsel, counsel actions which "might be considered sound trial strategy," are presumed effective. *Strickland*, 466 U.S. 668 at 687, 104 S.Ct. 2052, 80 L.Ed. 2d 674. Trial counsel here might have reasonably concluded that the probability of success on objection to these statements was insufficient to outweigh the danger of appearing to the jury combative during closing arguments. Appellant's fifth assignment of error is not well-taken.

V. Cumulative Error

{¶ 47} In his final assignment of error, appellant asserts that if none of his prior assignments of error reach the threshold of reversible error, in combination prejudice should be found.

{¶ 48} We have found no trial errors. The only error we have found relates to sentencing issues and we are remanding this matter for correction. Accordingly, appellant's sixth assignment of error is not well-taken.

{¶ 49} On consideration, the judgment of the Lucas County Court of Common Pleas is affirmed, in part, and reversed, in part. This matter is remanded to said court for

the proper notification of the imposition of prosecutorial costs and the merger of allied offenses. It is ordered that appellee pay the court costs of this appeal.

Judgment affirmed, in part,
and reversed, in part.

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, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
CONCUR.
JUDGE