[Cite as *State v. Elder*, 2011-Ohio-294.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO Appellee v. TRAVIS L. ELDER and MARC T. KIRKSEY Appellants	C.A. Nos. 25217 25259 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. 08-09-3123 (A) (B)

DECISION AND JOURNAL ENTRY

Dated: January 26, 2011

MOORE, Judge.

{¶1} Appellants, Travis Elder and Marc Kirksey, appeal the decision of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} On September 18, 2008, Joshua Robinson, the victim, and his friend, David Baughman, were attempting to procure marijuana. Their search for drugs led them to a home on Johnson Street in Akron, Ohio, where they met Travis Elder. Elder gave the men his phone number and indicated that he could help them locate drugs. Eventually, after leaving the home and making several more attempts to locate drugs, Robinson and Baughman called Elder. Elder told Robinson and Baughman to meet him at the home on Johnson Street. Baughman and

Robinson drove to the home to pick up Elder. Elder informed Baughman and Robinson that his friend, Marc Kirksey, would go with them because he was the one with the drug connection.

{¶3} The four men drove to an apartment complex on Virginia Avenue, also in Akron. Elder, Kirksey, and Robinson got out of the car while Baughman remained. Elder went behind a building, stating that he was going to talk to the person with the drugs. When Elder came back to the car, he informed the men that the person with the drugs was nervous that Robinson and Baughman were the police. Kirksey then went behind the building to allegedly assure the person that Baughman and Robinson were not the police. Kirksey came back to the car and informed the men that everything was fine. Then Kirksey, Elder, and Robinson went behind the building. Approximately 30 seconds later, Baughman heard a gunshot and saw Robinson run from behind the building and collapse halfway across the parking lot. Robinson died shortly thereafter from a gunshot wound to his heart.

{¶4} On October 3, 2008, Kirksey and Elder were each indicted on one count of aggravated murder, in violation of R.C. 2903.01(B), one count of murder, in violation of R.C. 2903.02(B), one count of aggravated robbery, in violation of R.C. 2911.01(A)(1)/(3), and one count of having a weapon while under disability, in violation of R.C. 2923.13(A)(3). They were both further charged with a firearm specification with regard to the aggravated murder, murder and aggravated robbery charges.

{¶5} On March 23, 2009, the case proceeded to a jury trial. At the conclusion of the evidence, the jury found Elder and Kirksey guilty of all the charges in the indictment. Both were sentenced to 25 years to life imprisonment on the aggravated murder convictions, ten years imprisonment for the aggravated robbery convictions, and five years imprisonment for the having weapons while under disability convictions. Further, both were sentenced to three years

imprisonment for the firearm specifications to be served prior to and consecutively with the aggravated murder convictions. The trial court merged the murder convictions with the aggravated murder convictions, and merged the remaining firearm specifications with the firearm specifications to the aggravated murder convictions. Finally, the trial court ordered the sentences to be served consecutively. Elder and Kirksey each timely appealed from their respective convictions. This Court consolidated their appeals.

II.

ELDER'S ASSIGNMENT OF ERROR I

"THE COURT OF COMMON PLEAS ERRED IN DENYING A MISTRIAL IN RESPONSE TO THE PROSECUTORIAL MISCONDUCT THAT OCCURRED DURING CLOSING ARGUMENTS IN VIOLATION OF [ELDER'S] CONSTITUTIONAL RIGHTS."

{¶6} In his first assignment of error, Elder contends that the trial court erred in denying a mistrial in response to alleged prosecutorial misconduct during the State's closing arguments.

{¶7} Elder contends that during closing argument, the State commented on Kirksey's failure to testify. Kirksey objected to the statement and moved for a mistrial. Elder joined in Kirksey's motion. The trial court sustained the objection but denied the motion and instead gave a curative instruction. Elder "lacks standing to challenge the trial court's actions with regard to [Kirksey's] assertion of his Fifth Amendment privilege against self-incrimination since that privilege is personal in nature and, thus, may be challenged only by [Kirksey]." *State v. Ramjit* (Feb. 15, 2001), 8th Dist. No. 77337, at *4, citing *State v. Jenkins* (1984), 15 Ohio St.3d 164 at 228; *State v. Diana* (1976), 48 Ohio St.2d 199 at 206; see, also, *Couch v. United States* (1973), 409 U.S. 322 at 328. The Supreme Court has yet to clarify Ohio law with respect to whether and when a defendant has standing to challenge a prosecutor's comment about a co-defendant's failure to testify. See *State v. Moritz* (1980), 63 Ohio St.2d 150 (noting that there is

disagreement among courts as to whether such commentary constitutes reversible error but upholding conviction because statement actually commented on the state of the evidence). Our research confirms that disagreement does exist. *Ex Parte Greathouse* (Ala.1993), 624 So.2d 208, 209 (stating in dicta that a prosecutor's comment on a co-defendant's failure to testify constitutes reversible error and is different "from an actor (such as counsel for a codefendant) [sic] without an institutional interest in the defendant's guilt[]") (citation omitted); *Harper v. State* (Fla.1963), 151 So.2d 881 (prosecutor may not comment on a co-defendant's decision not to testify at trial when the appellant also did not testify); *Chance v. State* (Okl.1975), 539 P.2d 412 (defendant failed to object, but error, if any, was cured by court instruction).

{¶8} To support his contention that he may raise this issue, Elder cites to *Kinser v. Cooper* (C.A.6, 1969), 413 F.2d 730, for the proposition that a prosecutor's comment upon the failure of one defendant to testify sufficiently prejudiced his co-defendant. The trial court in that case, however, noted that "[i]n considering the effect on the appellant of his co-defendant's failure to testify we must keep in mind that the co-defendant was only charged with aiding and abetting the appellant in committing the crime. [The co-defendant] could not be convicted of a crime unless [the appellant] was convicted. If [the appellant] did not commit a crime there was no crime in which [the co-defendant] could have aided in committing." Id. at 732. Therefore, the court reasoned, "[i]f then [the co-defendant's] failure to testify left an inference of guilt, of what was he guilty? It could only have been that he was guilty of assisting [the appellant] in [the crime]." Id.; see, also, *Scott v. Perini* (C.A.6, 1971), 439 F.2d 1066 (aider and abettor scenario nearly identical to, and reasoning reliant upon, *Kinser*). In *United States v. Robinson* (C.A.6, 1983), 716 F.2d 1095, overruled on other grounds by *United States v. Robinson* (1985), 470 U.S. 1025, the court distinguished *Kinser* and held that a prosecutor's statement about a co-

defendant's failure to testify did not support reversal because the co-defendant was charged with a substantive offense rather than aiding and abetting. Id. at 1101. For that reason, the co-defendant's failure to testify could not have been construed as an admission that implicated the defendant as the principal offender.

{¶9} In the instant case, Elder was charged with aggravated murder, murder, aggravated robbery and having weapons under a disability. While the jury was instructed on complicity, he was charged as a principal in the crimes. Accordingly, we decline to extend the holding in *Kinser*, supra, to the facts of this case. Elder's first assignment of error is overruled.

ELDER'S ASSIGNMENT OF ERROR II

"WHETHER TRIAL COUNSEL'S REPRESENTATION WAS DEFICIENT AND AFFECTED THE OUTCOME OF THE CASE[.]"

{¶10} In his second assignment of error, Elder contends that his trial counsel was ineffective.

{¶11} Specifically, Elder contends that his counsel was ineffective for not seeking severance of Elder and Kirksey's cases due to the conflicting interests of the co-defendants, for not seeking severance pursuant to *Bruton v. United States* (1968), 391 U.S. 123, and in allowing the co-defendant's cases to be tried together. This Court reads these statements as a single argument that Elder's counsel was deficient for failing to pursue the severance of Elder and Kirksey's case. We do not agree.

{¶12} In considering a defendant's claim of ineffective assistance of counsel, this Court employs a two-step process. *Strickland v. Washington* (1984), 466 U.S. 668, 669. First, we must determine whether trial counsel engaged in a "'substantial violation of any *** essential duties to his client.'" *State v. Bradley* (1989), 42 Ohio St.3d 136, 141, quoting *State v. Lytle* (1976), 48 Ohio St.2d 391, 396. Second, we must determine if the trial counsel's ineffectiveness resulted in

prejudice to the defendant. *Bradley*, 42 Ohio St.3d at 141-142, citing *Lytle*, 48 Ohio St.2d at 396-397. We may "analyze the prejudice prong of the *Strickland* test alone if such analysis will dispose of a claim of ineffective assistance of counsel on the ground that the defendant did not suffer sufficient prejudice." *State v. Kordeleski*, 9th Dist. No. 02CA008046, 2003-Ohio-641, at ¶37, citing *State v. Loza* (1994), 71 Ohio St.3d 61, 83 (overruled on other grounds). Prejudice exists where there is a reasonable probability that the trial result would have been different but for the alleged deficiencies of counsel. *Bradley*, 42 Ohio St.3d at paragraph three of the syllabus.

{¶13} On December 2, 2008, Elder filed a motion to sever his case from Kirksey's case. This motion was based upon statements Kirksey made to police upon his arrest. In this statement, Kirksey accused Elder of shooting Robinson. Elder pointed to *Bruton*, supra, for the proposition that the admission of a co-defendant's confession that implicated another defendant during their joint trial is reversible error. *Bruton*, 391 U.S. at 124-126. We have stated that, "[i]n *Bruton*, the United States Supreme Court found that a co-defendant's statement implicating a defendant cannot be used in a joint trial unless the co-defendant is available for cross-examination." *State v. Kuhn*, 9th Dist. No. 05CA008859, 2006-Ohio-4416, at ¶7, citing *Bruton*, 391 U.S. at 127-128.

{¶14} On December 15, 2008, the trial court ordered the State to elect whether it would use Kirksey's statement at trial. The trial court stated that it would rule on Elder's motion to sever based upon this election. It is not clear from the record whether this election was made prior to trial. However, the record is clear that the State intended to elicit testimony from Sergeant Garro regarding portions of Kirksey's statement to him. Prior to this testimony, however, the trial court discussed the potential issues, out of the hearing of the jury, with Elder, Kirksey and their respective counsel. During the discussion, the prosecutor alluded to prior

discussions with Elder's counsel that were not revealed on the record. The discussion regarding the severance issue was as follows:

> "[PROSECUTOR]: *** In discussions with Mr. Elder's attorney, Kirk Migdal, he has indicated that he was not objecting to us brings [sic] that in, for his own trial strategy reasons, which if he wants to divulge he can. But obviously -- but for that reason, we want to bring it up before the Court so the Court is aware that what we are going to do is generally not permissible against Mr. Elder. However, based on the representations by Mr. Migdal, we are going to be bringing it in as an admission by a party opponent against Mr. Kirksey.
>
> "THE COURT: Mr. Midgal?
>
> "MR. MIGDAL: That is correct, Judge. Even though -- even though we have a right to confront, cross-examine, we are going to waive that right because we believe statements that come in contradict the main witness and are beneficial to my client.
>
> "THE COURT: All right. You have discussed this with your client?
>
> "MR. MIGDAL: Yes.
>
> "THE COURT: And you have had that discussion, Mr. Elder?
>
> "MR. ELDER: Yes.
>
> "THE COURT: All right. And you are in agreement with your attorney?
>
> "MR. ELDER: Yes.
>
> "THE COURT: Your attorney advised you regarding trial strategy here?
>
> "MR. ELDER: Yes.
>
> "THE COURT: All right. The Court will find that a knowing, voluntary, intelligent waiver with regard to any *Bruton* issues that I anticipate are going to arise here."

{¶15} During its cross-examination of Sergeant Garro, the State asked specific questions regarding Kirksey's statement. At a sidebar, Kirksey's counsel again requested that the entire tape-recorded statement be played for the jury. He contended that the State had taken Kirksey's statements out of context. The State indicated that it did not want the entire statement played because it was self-serving. The trial court determined that the statements were not taken out of

context, and after further discussion between the trial court and counsel, held both on and off the record, the parties agreed to play the entire tape.

{¶16} "There are numerous avenues through which counsel can provide effective assistance of counsel in any given case, and debatable trial strategies do not constitute ineffective assistance of counsel." *State v. Diaz*, 9th Dist. No. 04CA008573, 2005-Ohio-3108, at ¶23. Even if we question trial counsel's strategic decisions, we must defer to his judgment. *State v. Clayton* (1980), 62 Ohio St.2d 45, 49. The Ohio Supreme Court has stated that

> "'[w]e deem it misleading to decide an issue of competency by using, as a measuring rod, only those criteria defined as the best of available practices in the defense field.' *** Counsel chose a strategy that proved ineffective, but the fact that there was another and better strategy available does not amount to a breach of an essential duty to his client." Id. quoting *Lytle*, 48 Ohio St.2d at 396.

{¶17} In the instant case, it is clear that Elder's counsel sought the introduction of Kirksey's statement to police because the statement was in direct contradiction to the State's main witness, Baughman, on many important details. The trial court's discussion of this issue with Elder indicates that not only did he know of this trial tactic, but he approved of the tactic. Further, during his closing argument, Elder's counsel highlighted the disparity between Kirksey's statement to Sergeant Garro and Baughman's testimony at trial.

{¶18} It is also clear from counsel's closing statement that he was attempting to show that Elder's mere presence at the time of the shooting did not make him an accomplice to the shooting. In other words, the introduction of the contradictory, arguably self-serving statement, could have allowed the jury to conclude that Kirksey was lying to conceal his guilt and that Elder was simply present at the scene.

{¶19} Accordingly, we conclude that Elder's counsel's decision not to pursue severance in this case was a trial strategy, and thus not ineffective. Elder's second assignment of error is overruled.

KIRKSEY'S ASSIGNMENT OF ERROR I

> "THE PROSECUTOR'S REMARKS DURING CLOSING ARGUMENT ROSE TO THE LEVEL OF PROSECUTORIAL MISCONDUCT WHICH DEPRIVED MARC KIRKSEY OF HIS RIGHT TO A FAIR TRIAL IN VIOLATION OF HIS 5TH, 6TH, AND 14TH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION."

{¶20} In his first assignment of error, Kirksey contends that the prosecutor's remarks during his closing argument rose to the level of prosecutorial misconduct which deprived him of his right to a fair trial. We do not agree.

{¶21} In deciding whether a prosecutor's conduct rises to the level of prosecutorial misconduct, a reviewing court determines whether the prosecutor's actions were improper, and, if so, whether the substantial rights of the defendant were actually prejudiced. *State v. Smith* (1984), 14 Ohio St.3d 13, 14. "[An appellant] must show that there is a reasonable probability that but for the prosecutor's misconduct, the result of the proceeding would have been different." *State v. Overholt*, 9th Dist. No. 02CA0108-M, 2003-Ohio-3500, at ¶47. Specifically, Kirksey points to the State's closing argument.

{¶22} "Parties have wide latitude in their closing statements, particularly 'latitude as to what the evidence has shown and what inferences can be drawn from the evidence.'" *State v. Wolff*, 7th Dist. No. 07 MA 166, 2009-Ohio-7085, at ¶13, quoting *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, at ¶213. A prosecutor may comment upon the testimony of witnesses and suggest the conclusions to be drawn. *State v. Hand*, 107 Ohio St.3d 378, 2006-Ohio-18, at ¶116.

Kirksey specifically takes issue with the prosecutor's statements regarding Kirksey's statement to the police. To this end, the prosecutor stated:

> "Now, this case is kind of interesting, and the reason for that is because Mr. Kirksey gives a statement that you heard, and you will have, and listen to it again. If you believe Mr. Kirksey's statement, it is pretty good circumstantial evidence that Travis Elder killed Joshua Robinson, because according to him, [Elder] and Josh are the only two that go back there and within moments a shot is heard, Josh comes out, and [Elder] comes out with a gun in his hand, goes through [Josh's] pockets, points the gun at [Kirksey] and Dave Baughman. That is an open and shut case in my world.
>
> "Well, why isn't he testifying for us against him?"

{¶23} Kirksey cites this Court to this portion of the transcript to support his proposition that "the prosecutor taints the jury's ability to evaluate the credibility of [Kirksey] and make an unbiased determination because of his personal evaluations of [Kirksey]. When referring to [Kirksey], the prosecutor completely discredited [Kirksey's] statement to police and trampled his constitutional right not to take the witness stand." To the extent that Kirksey contends that the above statement was an improper comment on his credibility, "[a] prosecutor may even point out a lack of credibility of a witness, if the record supports such a claim." *Wolff*, supra, at ¶13, citing *State v. Powell*, 177 Ohio App.3d 825, 2008-Ohio-4171, at ¶45. The prosecutor's statement reiterates Kirksey's statement. It does not express or imply the prosecutor's personal belief of Kirksey's credibility. Even if we read this cited paragraph as a comment upon Kirksey's credibility, we would conclude that the record would support such a claim. Id. As noted in our discussion of Elder's second assignment of error, Kirksey's statement was directly contradictory to Baughman's testimony. Accordingly, the prosecutor was permitted to point out that Kirksey's statement had been contradicted and therefore was suspect. The prosecutor's statement was not an improper comment on Kirksey's credibility.

{¶24} We next turn to Kirksey's contention that the above cited statement infringed upon his constitutional right not to testify at trial. "A prosecutor may jeopardize the integrity of a trial by commenting on a criminal defendant's decision not to testify." *State v. Collins* (2000), 89 Ohio St.3d 524, 528, citing *State v. Thompson* (1987), 33 Ohio St.3d 1, 4; *Griffin v. California* (1965), 380 U.S. 609. Kirksey objected to the above cited statement, arguing to the trial court that it was an impermissible statement on his constitutional right not to testify. "The question is 'whether the language used was *manifestly* intended or was of such character that the jury would naturally and *necessarily* take it to be a comment on the failure of the accused to testify.' (Emphasis added.) *Knowles v. United States* (C.A.10, 1955), 224 F.2d 168, 170, quoted in *State v. Cooper* (1977), 52 Ohio St.2d 163, 173[]." *State v. Webb* (1994), 70 Ohio St.3d 325, 328-29.

{¶25} This case is complicated by the fact that there were two defendants, both of whom appeared to blame the other. Kirksey, in his statement to Sergeant Garro, placed full blame upon Elder. After Kirksey's objection to the prosecutor's statement, the prosecutor explained at sidebar that he was attempting to show that in his statement, Kirksey offered to testify against Elder in an attempt to lessen his own charges. Therefore, the prosecutor argued, Kirksey's statement was not believable because he did not testify against Elder. On appeal, the State notes that the prosecutor was not attempting to imply that Kirksey's choice not to testify was an inference of his guilt. Instead, the prosecutor was arguing that "if Kirksey's statement was credible and he actually had no involvement in either the robbery or the murder", then he would have fulfilled his offer to testify against Elder. Although this is a subtlety that could be lost upon a jury, we do not conclude that the statement was *manifestly* intended to be a comment on

Kirksey's failure to testify, nor would the jury *necessarily* take it as a comment on his decision not to testify in his own defense. *Webb* (1994), 70 Ohio St.3d at 328-29.

{¶26} Kirksey's first assignment of error is overruled.

KIRKSEY'S ASSIGNMENT OF ERROR II

> "THE EVIDENCE IN THIS CASE WAS INSUFFICIENT AS A MATTER OF LAW TO SUPPORT A CONVICTION OF AGGRAVATED MURDER AND AGGRAVATED ROBBERY AND AS A RESULT [KIRKSEY'S] RIGHTS AS PROTECTED BY ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION AND FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION WERE VIOLATED."

{¶27} In his second assignment of error, Kirksey contends that the evidence in this case was insufficient to sustain his convictions for aggravated murder and aggravated robbery. We do not agree.

{¶28} When considering a challenge to the sufficiency of the evidence, the court must determine whether the prosecution has met its burden of production, while a manifest weight challenge requires the court to examine whether the prosecution has met its burden of persuasion. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390 (Cook, J., concurring). To determine whether the evidence in a criminal case was sufficient to sustain a conviction, an appellate court must view that evidence in a light most favorable to the prosecution:

> "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the 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 crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶29} Kirksey contends that his conviction for aggravated murder was not based on sufficient evidence. R.C. 2903.01(B) states that "No person shall purposely cause the death of

another or the unlawful termination of another's pregnancy while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, kidnapping, rape, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary, burglary, terrorism, or escape."

{¶30} Kirksey was also convicted of aggravated robbery.

{¶31} Pursuant to R.C. 2911.01(A)(1)/(3):

> "No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following:
>
> "(1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it;
>
> "(3) Inflict, or attempt to inflict, serious physical harm on another."

{¶32} Although Kirksey generally contends that both convictions were not based upon sufficient evidence, he does not specifically delineate which element of which count he contends the State failed to prove. Instead, he states that "there was no evidence whatsoever to show that [Kirksey] shot the victim, took part in any robbery where the victim was shot, or even saw who shot the victim in this matter." This argument fails to recognize that the jury in this case was instructed on complicity.

{¶33} R.C. 2923.03(A)(2) provides that "[n]o person, acting with the kind of culpability required for the commission of an offense, shall do any of the following: *** (2) Aid or abet another in committing the offense[.]" In addition, anyone who "violates this section is guilty of complicity in the commission of an offense, and shall be prosecuted and punished as if he were a principal offender. A charge of complicity may be stated in terms of this section, or in terms of the principal offense." R.C. 2923.03(F). An individual aids or abets "when he supports, assists, encourages, cooperates with, advises, or incites the other person in the commission of the crime,

and shares the other person's criminal intent." *State v. Ward*, 9th Dist. No. 24105, 2008-Ohio-6133, at ¶17, citing *State v. Johnson* (2001), 93 Ohio St.3d 240, syllabus. Furthermore, an individual's intent may be inferred from circumstances surrounding the crime. Id.

{¶34} "'Participation in criminal intent may be inferred from presence, companionship and conduct before and after the offense is committed.'" *Johnson*, 93 Ohio St.3d at 240, quoting *State v. Pruett* (1971), 28 Ohio App.2d 29, 34. However, mere presence at the scene of the crime is insufficient. *Ward* at ¶17, citing *Johnson*, 93 Ohio St.3d at 243.

{¶35} In the instant case, Baughman testified that on September 18, 2008, he and Robinson were trying to purchase marijuana. They had collected $400 to purchase marijuana for themselves and for their friends. After calling everyone they knew, a woman named Barbra sent them to meet her cousin, James, on Johnson Street. Baughman and Robinson traveled to Johnson Street, picked up James and drove to a few houses looking for drugs. Because Robinson had previously been robbed while trying to purchase drugs, he wanted to see the drugs before he gave anyone his money. Baughman testified that Robinson was driving a Jaguar. At one of the houses where they stopped to attempt to purchase drugs, Elder approached them, admiring the vehicle. Elder told Robinson and Baughman that if James could not help them procure drugs, he would, and gave them his number. Eventually, James took Robinson and Baughman to a man who demanded half the money up front, and then took the money and did not return and did not give them drugs. Baughman and Robinson returned home.

{¶36} Robinson and Baughman decided to call Elder. Elder said he could sell the men a quarter pound of marijuana and to meet them at the house on Johnson Street. Baughman and Robinson drove to Johnson Street in a pick-up truck. When they arrived, Elder informed them that his "buddy," Kirksey, was going to go with them and that he was the one with the drug

connection. Therefore, Elder got into the bed of the truck and Kirksey sat up front and directed Robinson where to drive to find drugs. The men arrived at Virginia Avenue. Robinson, Kirksey and Elder got out of the vehicle and Baughman stayed behind. Elder went behind the building first, stating that he needed to talk to the person with drugs. When he came back out, he said that he was not sure because the person with the drugs was concerned that Baughman and Robinson were the police. Kirksey then went behind the building allegedly to assure the person with the drugs that the men were not the police. When he came back to the car, he informed Baughman and Robinson that everything was "official" and the three men, Elder, Kirksey, and Robinson, went behind the building. Baughman testified that 30 seconds later he heard what sounded like a large firecracker, and saw Robinson run around the corner. He stated that he met him halfway through the parking lot when Robinson collapsed. He verified that he never saw Kirksey again after the shooting

{¶37} Baughman testified that the gunshot sounded like it was outside rather than inside an apartment. He explained that when the three men went behind the building, he could not see them. Baughman testified that Robinson had the money on him when they went to Virginia Avenue. Later testimony revealed that neither the police nor the medical examiner located a wallet or any money on Robinson after the shooting.

{¶38} George Sterbenz, a forensic pathologist with the Summit County Medical Examiner's office, testified that he conducted the autopsy on Robinson. He stated that the cause of death was a gunshot wound to the chest. He explained that Robinson was wearing a sweatshirt with a tee-shirt underneath. He stated that there was visible gunshot residue on the tee-shirt, but not on the sweatshirt. Sterbenz verified that this finding was consistent with a contact gunshot wound, meaning that the muzzle of the gun was "pushing up against his left

chest wall through-through the two layers of clothing." He testified that Robinson would have died within two minutes of the shooting.

{¶39} Officer Eric Wood testified that he participated in the search for Kirksey. He stated that on September 21, 2008, three days after the shooting, police became aware that Kirksey was at a particular address and surrounded the home. They asked everyone to come out, and then sent in a police dog. Kirksey was found hiding in an attic crawl space.

{¶40} Akron Police Department Detective James Pasheilich testified that he received information from an inmate regarding the incident. The inmate presented Detective Pasheilich with a letter that he stated Elder wrote. Although the inmate wanted to trade the information for leniency on his charges, Detective Pasheilich testified that he could not help the inmate, and the inmate gave him the information regardless. The letter, allegedly written by Elder to an unknown person, asked that person to threaten Baughman not to testify. The letter included Baughman's address and telephone number.

{¶41} Detective Pasheilich testified that he sent the letter to BCI to verify whether it was written by Elder. Detective Pasheilich testified that he took other samples of what were presumed to be Elder's writing from Elder's jail house cell and also submitted those for comparison purposes to BCI. BCI requested a handwriting exemplar, which was a known sample of Elder's handwriting. Detective Pasheilich testified that he administered the exemplar and observed Elder complete the writing sample. He stated that Elder's behavior was odd while he completed the writing sample. Notably, he explained, Elder did not hold the paper while he was writing so that the paper moved.

{¶42} Jessica Toms from BCI, who examined the letter and the handwriting samples, stated that it was likely that when the police request someone to provide handwriting samples

that they will try to disguise their handwriting. She verified that she discovered that Elder attempted to disguise his handwriting on the exemplar. Due to this, she testified that although there were similarities between the letter and the exemplar, it was not conclusive due to the limited amount of a comparable sample. She did, however, verify that the handwriting on the letter conclusively matched the other writing samples taken from Elder's cell.

{¶43} Sergeant David Garro testified that he interviewed Kirksey. He stated that although Kirksey informed him that he did not know Elder prior to the day in question, he knew Elder's phone number from memory. Kirksey denied any involvement in the incident.

{¶44} Viewing this testimony in the light most favorable to the State, a reasonable juror could believe that Kirksey participated in the robbery in which Robinson was shot. It is clear from the evidence that as a result of this activity, Robinson was fatally injured. Even in the absence of specific evidence of who actually shot Robinson, the jury could infer from the above testimony that Kirksey knew Elder and that his presence at the crime scene was more than a "mere presence." Both Kirskey and Elder's flight from the scene, as well as the fact the police later found Kirksey hiding in a crawl space, can be viewed as evidence of a consciousness of guilt. *State v. Brady*, 9th Dist. No. 22034, 2005-Ohio-593, at ¶9, quoting *State v. Taylor* (1997), 78 Ohio St.3d 15, 27. Further, the fact that Elder attempted to keep Baughman from testifying by having someone threaten him can also be evidence of a consciousness of guilt. *State v. Brown* (July 28, 1988), 8th Dist. No. 52593, at *3.

{¶45} Thus, based upon a theory of complicity, the jury could find the essential elements of aggravated robbery beyond a reasonable doubt. Further, the jury could reasonably conclude from Sterbenz's testimony that either Kirksey or Elder purposely placed the gun directly against Robinson's chest in an attempt to force him to give them money and then shot

him after they took the money. Therefore, viewing the above testimony in the light most favorable to the State, a reasonable juror could also find that the State proved the essential elements of aggravated murder beyond a reasonable doubt.

{¶46} Kirksey's second assignment of error is overruled.

KIRKSEY'S ASSIGNMENT OF ERROR III

> "THE VERDICTS IN THIS CASE WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND AS A RESULT, [KIRKSEY'S] RIGHTS AS PROTECTED BY ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION AND FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION WERE VIOLATED."

{¶47} In his third assignment of error, Kirksey contends that the verdicts in this case were against the manifest weight of the evidence. We do not agree.

{¶48} "While the test for sufficiency requires a determination of whether the state has met its burden of production at trial, a manifest weight challenge questions whether the state has met its burden of persuasion." *State v. Gulley* (Mar. 15, 2000), 9th Dist. No. 19600, at *1, citing *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390 (Cook, J., concurring).

{¶49} A determination of whether a conviction is against the manifest weight of the evidence does not permit this Court to view the evidence in the light most favorable to the State to determine whether the State has met its burden of persuasion. *State v. Love*, 9th Dist. No. 21654, 2004-Ohio-1422, at ¶11. Rather,

> "an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Otten* (1986), 33 Ohio App.3d 339, 340.

{¶50} In his manifest weight argument, Kirksey essentially reiterates the argument he made regarding sufficiency. He contends that it was "unclear after reviewing all the testimony

who is responsible for firing this shot and causing the death of Robinson. In fact, no testimony was presented whatsoever to indicate that either [Kirksey] or Elder ever possessed a firearm capable to inflict the injury that Robinson sustained or any firearm at all. No firearm was ever found and no shell casings or other evidence was found at the scene to indicate that [Kirksey] or Elder was involved in this offense."

{¶51} As we explained above, there was sufficient evidence to prove that Kirksey was complicit in the robbery and murder. To the extent that he contends that the evidence did not reveal who was the principal offender in this case, R.C. 2923.03(B) provides that "[i]t is no defense to a charge under this section that no person with whom the accused was in complicity has been convicted as a principal offender." Finally, if the State relies on circumstantial evidence to prove an essential element of an offense, it is not necessary for "'such evidence to be irreconcilable with any reasonable theory of innocence in order to support a conviction.'" *State v. Daniels* (June 3, 1998), 9th Dist. No. 18761, at *2, quoting *Jenks*, 61 Ohio St.3d at paragraph one of the syllabus. "'Circumstantial evidence and direct evidence inherently possess the same probative value[.]'" *State v. Smith* (Nov. 8, 2000), 9th Dist. No. 99CA007399, at *6, quoting *Jenks*, 61 Ohio St.3d at paragraph one of the syllabus.

{¶52} In this case, Baughman testified that Kirksey was at the scene and accompanied Robinson behind a building to obtain drugs. Baughman stated that 30 seconds later, he heard a gunshot and Robinson came from behind the building, collapsed and died. Elder and Kirksey fled the scene. The medical examiner verified that Robinson died of a gunshot wound to the heart and retrieved the bullet from Robinson's body. The jury could infer Elder and Kirksey's guilt from this circumstantial evidence, coupled with the evidence of Elder and Kirksey's consciousness of guilt as we explained above.

{¶53} Finally, Kirksey contends that there was a lack of "reliable physical evidence" tying him to the murder and/or robbery. This statement ignores the testimonial evidence as stated above. "Proof of guilt may be made by circumstantial evidence as well as by real evidence and direct or testimonial evidence, or any combination of these three classes of evidence. All three classes have equal probative value, and circumstantial evidence has no less value than the others." (Citations and quotations omitted.) *State v. Nicely* (1988), 39 Ohio St.3d 147, 151. Therefore, the mere fact that the State did not locate and produce the murder weapon or shell casings does not transform Kirksey's conviction into a manifest miscarriage of justice.

{¶54} A review of the record does not reveal that the jury clearly lost its way when it convicted Kirksey. Kirksey's third assignment of error is overruled.

KIRKSEY'S ASSIGNMENT OF ERROR IV

> "CONSIDERED TOGETHER, THE CUMULATIVE ERRORS IN THE TRIAL DEPRIVED [KIRKSEY] OF A FAIR TRIAL IN VIOLATION OF [KIRKSEY'S] 6TH AND 14TH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION."

{¶55} In his fourth assignment of error, Kirksey contends that when considered together, the cumulative errors in the trial deprived him of a fair trial. We do not agree.

{¶56} Kirksey bases this argument on his first three assignments of error. He contends that "[a]ll of the above cited errors or misconduct go directly to the determination of whether [he] was guilty of aggravated murder and aggravated robbery." We conclude that "the doctrine of cumulative error is not applicable as we did not find multiple instances of harmless error." *State v. Wade*, 9th Dist. No. 02CA0076-M, 2003-Ohio-2351, at ¶55, citing *State v. Garner* (1995), 74 Ohio St.3d 49, 64. Accordingly, Kirksey's fourth assignment of error is overruled.

KIRKSEY'S ASSIGNMENT OF ERROR V

"[KIRKSEY] ASSERTS THAT HE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF HIS 5TH, 6TH, AND 14TH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION."

{¶57} In his fifth assignment of error, Kirksey contends that he was denied the effective assistance of counsel. We do not agree.

{¶58} We have fully set forth above our standard for reviewing an ineffective assistance of counsel claim. Kirksey contends that his counsel was ineffective for two reasons. He first contends that his counsel should have moved to sever his trial from Elder's based upon the *Bruton* issue raised by the use of his own statement implicating Elder. First, we note that Elder's counsel moved to sever the trials. Kirksey does not explain how his trial would have been any different had his counsel also filed a motion to sever. On appeal, Kirksey does not raise any other basis upon which he believed his trial should have been severed from Elder's. Further, as Kirksey states on appeal, any *Bruton* issue was "clearly the co-defendant's[.]" As we explained in our response to Elder's first assignment of error, Elder's counsel was not ineffective because his decision to allow the co-defendants to be tried together was a clear trial tactic and Elder himself waived the issue. Accordingly, we conclude that Kirksey cannot show prejudice due to any failure on the part of his counsel to request a severance of the trial.

{¶59} Next, Kirksey contends that his counsel was ineffective for failing to object to the introduction of evidence regarding his statement to Sergeant Garro. Kirksey contends that "[t]he resulting error was that counsel allowed the state, through the detective, to effectively use [Kirksey's] statement without seeking to admit the actual statement." This is not an accurate representation of the record at trial. As we explained above, prior to calling Sergeant Garro to the stand, the trial court held a discussion with counsel at side bar. Specifically, Kirksey's

counsel strenuously argued that the entire tape recording of Kirksey's statement to Sergeant Garro should be played. The trial court stated that it would allow Sergeant Garro to testify to the statement and then, if any statements were elicited out of context of the entire statement, it would discuss those issues at the conclusion of the testimony, at sidebar.

{¶60} On appeal, Kirksey specifically takes issue with Sergeant Garro's testimony that implied that Kirksey and Elder must have known each other because Kirksey was able to state Elder's phone number from memory. At the conclusion of the State's direct examination of Sergeant Garro, Kirksey's counsel reiterated his request to play the entire tape-recorded statement. He explained to the trial court that he felt that Sergeant Garro's statement with regard to Kirksey knowing Elder's phone number was taken out of context. Again, he strenuously argued that the entire tape-recorded statement should be played. The trial court stated that it did not believe that, after listening to the tape-recorded statement, the discussion of the phone number was taken out of context. Eventually, the parties agreed that the State would reopen its direct examination of Sergeant Garro and play the entire tape. During the tape recorded statement, Kirksey stated that he knew Elder's phone number because he tried to contact him after the shooting occurred to find out why he was trying to get him into this mess.

{¶61} Therefore, this Court concludes that not only did Kirksey's counsel strenuously fight to play the entire tape-recorded statement for the jury prior to and after Sergeant Garro's testimony, he was eventually successful and the entire tape was indeed played. Thus, even if we were to agree that Kirksey's counsel breached some essential duty to his client, Kirksey cannot show that he was prejudiced. Accordingly, Kirksey's fifth assignment of error is overruled.

KIRKSEY'S ASSIGNMENT OF ERROR VI

> "[KIRKSEY] ALLEGES THAT CONDUCT BY THE TRIAL JUDGE AMOUNTED TO JUDICIAL MISCONDUCT WHICH DEPRIVED [HIM] OF A FAIR TRIAL IN VIOLATION OF [HIS] 6TH AND 14TH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION."

{¶62} In his sixth assignment of error, Kirksey contends that the conduct by the trial judge amounted to judicial misconduct. We do not agree.

{¶63} Kirksey contends that the trial judge was biased and fundamentally unfair. This argument is based upon non-specific, non-verbal conduct which is not represented on the record before this Court. Kirksey concedes that his argument "rests solely on conduct that is non-verbal and outside the record for the Court's review. However, [Kirksey] still wishes to assert this assignment of error, if for no other reason, to protect the record for any possible future proceedings." As the record does not support Kirksey's contention, his sixth assignment of error is overruled.

III.

{¶64} Kirksey and Elder's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellants.

CARLA MOORE
FOR THE COURT

DICKINSON, P. J.
CARR, J.
CONCUR

APPEARANCES:

KAREN H. BROUSE, Attorney at Law, for Appellant.

CHRISTOPHER R. SNYDER, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN DIMARTINO, Assistant Prosecuting Attorney, for Appellee.