

[Cite as *State v. Craig*, 2010-Ohio-1857.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93137

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DEVON CRAIG

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-508656

BEFORE: Celebrezze, J., Blackmon, P.J., and Dyke, J.

RELEASED: April 29, 2010

**JOURNALIZED:
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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Defendant-appellant, Devon Craig (“appellant”), appeals his conviction for murder. Based on our review of the record and pertinent case law, we affirm.

{¶ 2} On the morning of March 4, 2008, the victim, Kameron Witherow (“Witherow”), was awakened by the daughter of his roommate, Monica Brown (“Brown”). Brown’s daughter informed Witherow that appellant and Brown, who were dating at the time, were having an altercation and requested Witherow’s assistance. Asia Elder (“Asia”), one of Brown’s many roommates, testified that appellant had Brown pinned against Brown’s bedroom door and would not let her go. Witherow and appellant argued and Witherow suggested the two go outdoors before engaging in any sort of physical altercation. After appellant walked outside, Witherow closed and locked the door behind him. Witherow, Brown, and the other individuals remaining in the apartment proceeded to laugh at appellant’s misfortune.

{¶ 3} After appellant was locked outside, Thomas Elder (“Thomas”), who was also living in the apartment, realized that appellant had his cell phone. Witnesses testified that Thomas asked Witherow to retrieve his cell phone and, once outside, Witherow and appellant engaged in a short physical altercation. Thomas testified that Witherow kept backing away from

appellant, the two eventually abandoned the fight, and Witherow returned to the apartment.

{¶ 4} A short while later, appellant returned to the apartment accompanied by a male identified as his brother. According to Asia, appellant's brother intended to fight Witherow until she explained the circumstances surrounding the morning's events. Appellant's brother then left; appellant became enraged and punched the front door to the apartment, breaking the glass. Asia, who was Witherow's girlfriend and the mother of his child, testified that appellant then indicated that he would return later with a group of friends.

{¶ 5} According to the testimony of Asia and Thomas, who is Asia's brother, appellant did in fact return to the apartment the evening of March 5, 2008. While there, he spoke to both Asia and Thomas. According to Asia, appellant hugged her, apologized for the previous day's occurrence, and then requested that she feel what was in his pocket. Upon doing so, Asia realized that appellant was carrying a handgun. She asked him if he intended to use the gun on Witherow, but appellant indicated that he did not.

{¶ 6} Thomas testified that appellant arrived at the apartment with a couple of his friends or cousins and apologized for the argument between himself and Witherow the previous day. Thomas then testified that appellant showed him a firearm that was in his pocket and indicated that he

was looking for Witherow. According to Thomas, appellant indicated that he was going to “blam,” meaning shoot, Witherow. After speaking with Asia and Thomas, appellant left the apartment.

{¶ 7} Brown testified that on the evening of March 5, 2008, she and her friend Jahonna Perryman (“Perryman”) intended to run various errands, including a trip to Ace Hardware to get the front window fixed and a trip to The Rose, a store that sells hair accessories.¹ The women were traveling in Perryman’s red Ford Taurus. Before entering The Rose, Brown and Perryman were approached by Witherow, who was carrying a bag and a monkey wrench. Witherow placed his bag in Perryman’s car. The women testified that they saw both appellant and Witherow in the vicinity of the shopping plaza’s parking lot before entering The Rose. According to Perryman, an unidentified male was with appellant at this time.

{¶ 8} Thomas testified that he received a phone call from Brown, who called to check on her children and to inform Thomas that she believed appellant and Witherow were about to fight. While in The Rose, Perryman and Brown heard gunshots. They left The Rose a few moments later but saw nothing. On their way back to Brown’s apartment, they picked up DeMario

¹The Rose is located in a shopping plaza on East 131st Street in Cleveland, Ohio, a short distance from the home where Brown, Asia, Thomas, Witherow, and appellant all stayed.

Warren and another individual,² who informed them that Witherow had been shot.

{¶ 9} The group returned to Brown's apartment and told Asia and Thomas that Witherow had been shot. Perryman, Brown, Asia, and Thomas returned to the plaza in Perryman's car. By this point, the police and EMS had arrived at the scene. After speaking with the authorities and being told that Witherow had already been taken to the hospital, the group left.

{¶ 10} Officer Michael Shay with the Cleveland Police Department testified that when he arrived at the plaza, EMS personnel were tending to Witherow, and thus he and his partner, Scott Sieger, began canvassing the area for spent shell casings or any physical evidence. Officer Shay was then approached by a young man, later identified as Michael Stewart ("Stewart"), who informed Officer Shay that he was looking in the wrong area for the shell casings. Stewart showed Officer Shay where the shooting had occurred. After looking in that area, Officer Shay discovered five spent shell casings that were in the snow and would have been difficult to find without Stewart's assistance.

{¶ 11} Officer Shay then put Stewart in the back of his police cruiser. Stewart was beginning to tell Officer Shay what he had witnessed when a red

²At trial, this individual was referred to as "Novere," but his actual identity was not ascertained.

Ford Taurus passed. Stewart told Officer Shay that he had seen the shooter emerge from that vehicle when he was going to buy cigarettes at the United Dollar Store, which is also located in the plaza. Officer Shay notified backup and proceeded to pull over the red Taurus.

{¶ 12} According to Officer Shay, the vehicle was occupied by Asia, Brown, Perryman, and Thomas. Officer Shay spoke with the three women while his partner interviewed Thomas. After being informed that appellant may have some involvement in the shooting, Officer Shay ran a search on his computer for appellant's name. When appellant's photo appeared on the computer screen, Stewart, who was still in the back of the police cruiser, indicated to Officer Shay that appellant was the shooter.

{¶ 13} According to Stewart's trial testimony, he saw a red Ford Taurus occupied by two females and two males park in the plaza's parking lot. After the two females went into The Rose, Stewart observed the two males arguing with Witherow. Stewart then saw one of the men, later identified as appellant, pull something that looked like a gun from his pocket. Stewart then heard what he believed to be gunshots and began to run toward his house, which was located only a few blocks from the plaza. Stewart did, however, take the time to look back and saw the two men who had emerged from the red Taurus running down Cain Avenue. According to Stewart, appellant still had something in his hand as he was running away.

{¶ 14} Stewart returned home and told his sisters, who knew Witherow, about the shooting. Stewart and his sisters returned to the plaza, and Stewart informed Officer Shay of what he had seen.

{¶ 15} Witherow was transported to the hospital where he was pronounced dead. According to Dr. Erica Armstrong, a forensic pathologist with the Cuyahoga County Coroner's Office, Witherow was shot in the back left thigh, the lower right buttock, and in the left arm. The bullet that went into Witherow's left arm exited through his armpit and reentered through the left chest cavity. According to Dr. Armstrong, appellant died as a result of these gunshot wounds and his death was ruled a homicide.

{¶ 16} Delonte Perry ("Perry"), one of appellant's close friends, testified that he saw appellant on the night of March 5, 2008. Perry was listening to music with his friends "Fruits" and Vince in Fruits's driveway when appellant arrived on foot. Perry and appellant left around 10:00 p.m. and went to the store. According to Perry, appellant admitted to shooting Witherow and asked for a place to stay. Perry and appellant stayed at Perry's girlfriend's house that night, and Perry had not seen appellant since the following day.

{¶ 17} Asia and Thomas went to stay with their mother following the incident. Both testified that an unidentified individual fired a gun outside their mother's home. Immediately following the gunshots, Thomas said he received a threatening voice mail message from appellant. Thomas and Asia

testified that they both heard the message and were absolutely certain that they heard appellant's voice saying, "You better get me before I get you."

{¶ 18} On March 15, 2008, the Garfield Heights Police Department ("GHPD") received an anonymous tip that appellant would be traveling southbound on East 131st Street in a black SUV with chrome wheels. According to the testimony of Patrolman Eric Cornell with GHPD, another officer was in an undercover car and had a BMV photo of appellant. The undercover officer observed appellant in the black SUV, and a short pursuit involving approximately six GHPD cruisers ensued.

{¶ 19} Officer Richard Fogle with GHPD testified that after the vehicle came to a stop, appellant emerged from the passenger side and engaged the officers in a foot chase. When he exited the vehicle, appellant was carrying a black backpack. At some point, appellant threw the backpack and was apprehended approximately 70 yards from the street after running through a brush covered area and through a ditch. The backpack was found on the opposite side of the ditch from where appellant was apprehended. A search of the backpack revealed a change of clothes and a semiautomatic pistol. This pistol was not the same gun that was used in the shooting on March 5, 2008.

{¶ 20} Paul Costello testified at trial that he and appellant were incarcerated in the county jail at the same time. Costello testified that,

while incarcerated, he and appellant discussed the shooting. After being released, Costello wrote a song about appellant's story, and the song's lyrics were read to the jury. According to Costello, appellant admitted to shooting Witherow and also awoke in the middle of the night crying. On cross-examination, Costello admitted that the song he wrote was made up not only of information he obtained from appellant, but also information obtained from other individuals and news articles on the shooting. Costello unequivocally testified, however, that appellant did admit to shooting Witherow.

{¶ 21} Appellant was indicted on one count of aggravated murder in violation of R.C. 2903.01(A), with one- and three-year firearm specifications. After a lengthy trial, the jury found him not guilty of aggravated murder, but guilty of the lesser included offense of murder in violation of R.C. 2903.02(A) and also guilty of both the one- and three-year firearm specifications. Appellant was sentenced to 15 years to life in prison for the murder conviction. The court then sentenced him to three years for one of the firearm specifications; the one-year firearm specification merged for purposes of sentencing. The sentence imposed for the firearm specification was to run prior and consecutive to the term imposed for appellant's murder conviction. This appeal followed.

Law and Analysis

{¶ 22} Appellant presents six assignments of error for our review.¹ He first argues that his conviction was based on insufficient evidence and was against the manifest weight of the evidence. He then argues that the trial court should have granted a mistrial when the trial prosecutor referenced his failure to testify. He also argues that the trial court committed reversible error in improperly admitting other acts testimony. In his fifth assignment of error, he argues that Officer Griffin gave improper testimony relating to the veracity of other witnesses. In his final assignment of error, he argues that the trial court should have suppressed statements he made to the police after he invoked his right to counsel.

{¶ 23} For ease of discussion, appellant's arguments will be addressed out of order.

Other Acts Evidence

{¶ 24} In his fourth assignment of error, appellant challenges the trial court's admission of other acts evidence. The admission or exclusion of evidence is within the discretion of the trial court, whose decision will not be disturbed absent an abuse of discretion. *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, 781 N.E.2d 88, at ¶43, citing *State v. Issa*, 93 Ohio St.3d 49, 64, 2001-Ohio-1290, 752 N.E.2d 904. An abuse of discretion "implies that

¹Appellant's assignments of error are contained in appendix A of this opinion.

the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

{¶ 25} With regard to the admissibility of other acts evidence, it is well established that "extrinsic acts may not be used to prove by inference that the accused acted in conformity with his other acts or that he has a propensity to act in such a manner. [*State v. Smith* (1990), 49 Ohio St.3d 137, 140]. Although Evid.R. 404(B) permits 'other acts' evidence for certain enumerated issues, 'the standard for determining admissibility of such evidence is strict.' *State v. Broom* (1988), 40 Ohio St.3d 277, paragraph one of the syllabus. Furthermore, under Evid.R. 403(A), even relevant evidence which is admissible under ordinary circumstances must be excluded if the probative value of the evidence is outweighed by the danger of unfair prejudice." *State v. Chaney*, Seneca App. No. 13-05-12, 2006-Ohio-6489, at ¶24.

{¶ 26} R.C. 2945.59, states: "In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may

show or tend to show the commission of another crime by the defendant.” See, also, Evid.R. 404(B).

{¶ 27} Appellant argues that the trial court improperly allowed witnesses to testify to his propensity for carrying a gun. He argues that this is other acts evidence, and it was not admitted for a proper purpose pursuant to Evid.R. 404(B) and R.C. 2945.59. In contrast, the state argues that the other acts testimony formed a part of the crime’s immediate background, was inextricably related to the shooting of Witherow, and was therefore used to prove identity. In making this argument, the state relies on *State v. Lowe*, 69 Ohio St.3d 527, 1994-Ohio-345, 634 N.E.2d 616, and *State v. Wilkinson* (1980), 64 Ohio St.2d 308, 415 N.E.2d 261. The state’s reliance on these cases is misguided.

{¶ 28} In *Lowe*, the state attempted to admit other acts testimony relating to the defendant’s questionable behavior with children to prove his motive or intent in allegedly committing the murders with which he was charged. *Lowe* at 527-528. The trial and appellate courts held that this evidence was inadmissible other acts evidence because it did not provide a substantial link between the defendant’s prior actions and the crimes charged and was thus insufficient to prove a motive, plan, or scheme. *Id.* at 530.

{¶ 29} In ruling that such evidence was inadmissible, the Ohio Supreme Court held that there are only two permissible ways to use other acts evidence to

prove identity. *Id.* at 531. “First are those situations where other acts ‘form part of the immediate background of the alleged act which forms the foundation of the crime charged in the indictment,’ and which are ‘inextricably related to the alleged criminal act.’” *Id.*, quoting *State v. Curry* (1975), 43 Ohio St.2d 66, 73, 330 N.E.2d 720. Second, other acts may be used to prove identity by establishing a modus operandi applicable to the crime charged. *Id.*

{¶ 30} In holding that the other acts evidence in *Lowe* was inadmissible, the Court found that the other acts the state attempted to introduce were not directly related to the crime charged or its aftermath. *Id.* See, also, *Wilkinson* at 319. The same is true in this case. The state attempted to introduce other acts evidence that appellant had a reputation for carrying a weapon. Several witnesses testified, after being asked by the prosecution, that appellant was known for carrying a gun in a black backpack. This evidence does not specifically relate to the shooting of Witherow, nor does it prove that appellant acted with a specific modus operandi. As such, this evidence was inadmissible to prove identity and must have been used for some other legitimate purpose.

{¶ 31} Having ruled out identity, the only other permissible uses of the other acts evidence would have been to prove opportunity, motive, preparation, plan, intent, knowledge, or absence of mistake or accident. *Lowe* at 530. The state does not argue that the other acts evidence was used for any of these purposes, nor do we see any relation between these uses and the evidence presented. Appellant’s reputation for carrying a firearm could have been used for only one

purpose in this case and that was to prove that appellant acted in conformity with this reputation and was carrying a firearm on March 5, 2008. This was an improper purpose for admitting other acts evidence, and the trial court's admission of such evidence was error.

{¶ 32} Appellant argues that the trial court's failure to exclude the other acts evidence is not harmless error. We disagree. Any error will be deemed harmless if it did not affect the accused's "substantial rights." Otherwise stated, the accused has a constitutional guarantee to a trial free from prejudicial error, not necessarily one free of all error. Before an error can be considered harmless, we must be able to "declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California* (1967), 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705. Where there is no reasonable possibility that the unlawful testimony contributed to a conviction, the error is harmless and therefore will not be grounds for reversal. *State v. Lytle* (1976), 48 Ohio St.2d 391, 358 N.E.2d 623, paragraph three of the syllabus, vacated on other grounds in (1978), 438 U.S. 910, 98 S.Ct. 3135.

{¶ 33} This case is comparable to *State v. Crosby*, Cuyahoga App. No. 92807, 2010-Ohio-1584. In *Crosby*, the trial court allowed multiple witnesses to testify as to what type of gun the defendant was known to carry. Although this court found such testimony to be improper other acts evidence, the error was deemed to be harmless in light of the evidence presented against the defendant. *Id.* at ¶16-17.

{¶ 34} As in *Crosby*, ample evidence was presented to convict appellant exclusive of the improper other acts testimony. Asia and Thomas both testified, in no uncertain terms, that appellant showed them the weapon he was carrying on March 5, 2008. Thomas testified that appellant indicated he was going to “blam” Witherow and asked if Thomas knew where Witherow could be located. Stewart, who was extremely reluctant to testify at trial, testified that he saw appellant pull a gun-shaped object out of his pocket and point it at Witherow. Although Stewart did not see appellant shoot Witherow, he testified that he heard gunshots and saw appellant running away with the gun-shaped object still in his hand. Based on the testimony of these three witnesses, who each saw appellant with a gun on the day Witherow was shot, any other acts evidence related to his reputation for carrying a firearm was harmless at best. As such, appellant’s fourth assignment of error is overruled.

Officer Sieger’s Testimony

{¶ 35} In his fifth assignment of error, appellant argues that the trial court abused its discretion in allowing Officer Sieger to testify to the veracity of other witnesses. Since this argument also involves the admission or exclusion of trial testimony, we must utilize an abuse of discretion standard as defined above.

{¶ 36} In support of his argument, appellant relies on *State v. Boston* (1989), 46 Ohio St.3d 108, 545 N.E.2d 1220 (overruled on other grounds). In

Boston, a doctor was permitted to testify that a child-victim did not fantasize stories she told to her mother about sexual abuse by the defendant. *Id.* at 128. The Court held that an expert may not testify to the veracity of a child declarant. *Id.* This concept has been extended, and it is now undisputed that a police officer may not testify to a witness's veracity. See *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, ¶122.

{¶ 37} A comparable argument was considered in *In re W.P.*, Cuyahoga App. No. 84114, 2004-Ohio-6627. In that case, this court found no error with a psychologist's testimony that, based on certain factors, she did not question the victim's truthfulness. *Id.* at ¶13. In finding that the psychologist's testimony was proper, this court relied on the fact that the victim testified at trial. *Id.* The court specifically held that "[w]ith the victim's testimony, the juvenile court was able to ascertain the credibility of the victim; whereas, in *Boston*, there was no independent indicia of reliability save for the expert witness who vouched for the child victim. Because of this, *Boston* is distinguishable." *Id.*

{¶ 38} On redirect, Officer Sieger was permitted to testify that he felt Thomas was being honest. Officer Sieger also testified that after comparing Thomas's statements to those offered by Perryman and Brown, the statements were consistent. As in *In re W.P.*, Perryman, Brown, and Thomas all testified at trial. As such, the jury had the opportunity to ascertain the credibility of the

witnesses, unlike *Boston* where there was no independent indicia of reliability. Accordingly, *Boston* is distinguishable, and appellant's fifth assignment of error is overruled.

Prosecutor's Improper Comments

{¶ 39} In his third assignment of error, appellant argues that the trial court should have granted him a mistrial when the prosecutor improperly commented on his failure to testify. The prosecutor specifically said, “[Defense counsel], unless I heard this wrong, said that they made a decision not to have his client testify based on the evidence. I probably could comment on the Defendant's failure to testify * * *.” According to the state, this comment was in response to the defense attorney's argument that appellant chose not to testify due to the lack of evidence against him.

{¶ 40} Improper comment cases have been divided into two categories. *State v. Clark* (1991), 74 Ohio App.3d 151, 156-157, 598 N.E.2d 740. First are those cases where the prosecutor directly commented on the defendant's decision not to testify. *Id.* at 157. The second category consists of statements that indirectly reference the defendant's failure to take the stand. *Id.* Given the prosecutor's direct reference to defense counsel's closing arguments and his statement that he “could probably comment on the Defendant's failure to testify[,]” we find that the prosecutor's comment falls within the first category. The comment, phrased as it was, was obviously intended to shed a negative light on appellant's decision not to testify.

{¶ 41} We must note, however, that “[n]ot every improper prosecutorial comment on a defendant’s silence requires the trial court to declare a mistrial. The standard of review developed by the United States Supreme Court requires the state in this case to demonstrate beyond a reasonable doubt that the prosecutor’s comment did not contribute to [appellant’s] convictions.” (Internal citations omitted.) *Clark* at 158.

{¶ 42} As stated above, significant evidence existed to convict appellant of murder regardless of the prosecutor’s improper comment. Our decision is bolstered by the fact that the court gave the jury a curative instruction directing them to disregard any comment by the prosecutor on appellant’s failure to testify.

Accordingly, any improper comment by the prosecutor was harmless error, and appellant’s third assignment of error is overruled.

Motion to Suppress

{¶ 43} In his sixth assignment of error, appellant argues that the trial court committed reversible error in denying his motion to suppress statements he made to Detective Griffin after invoking his right to counsel. When considering a trial court’s grant or denial of a motion to suppress, this court’s standard of review is divided into two parts. In *State v. Lloyd* (1998), 126 Ohio App.3d 95, 100-101, 709 N.E.2d 913, the court stated: “[O]ur standard of review with respect to motions to suppress is whether the trial court’s findings are supported by competent, credible evidence. *State v. Winand* (1996), 116 Ohio

App.3d 286, 288, 688 N.E.2d 9, 11, citing *Tallmadge v. McCoy* (1994), 96 Ohio App.3d 604, 608, 645 N.E.2d 802, 804-805. * * * However, once we accept those facts as true, we must independently determine, as a matter of law and without deference to the trial court's conclusion, whether the trial court met the applicable legal standard.”

{¶ 44} Detective Griffin was the only witness to testify at the suppression hearing. According to Detective Griffin, appellant indicated that he wished to talk to the detectives, but his attorney told him not to. Detective Griffin read appellant his *Miranda* rights aloud and also provided him with a written form setting forth these rights. On the written version of the *Miranda* rights, appellant indicated that he did not wish to speak with the detectives without his attorney present. Detective Griffin then informed appellant that the interview must stop, and appellant must be transported back to the county jail. Despite this information and his request to have an attorney present, appellant continued to initiate conversation with the detectives and continued to make declarations. Detective Griffin specifically testified that he made two attempts to transport appellant back to the jail and advised him twice of his *Miranda* rights. Despite these repeated attempts by the detective, appellant told the detective that the gun found in the black backpack was not his and asked who had told the detective that appellant shot Witherow.

{¶ 45} Once a defendant invokes his right to counsel, interrogation must cease until that attorney is present. *Miranda v. Arizona* (1966), 384 U.S. 436,

474, 86 S.Ct. 1602, 16 L.Ed.2d 694. This rule has been upheld on numerous occasions. See, e.g., *Michigan v. Mosley* (1975), 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313; *Fare v. Michael C.* (1979), 442 U.S. 707, 99 S.Ct. 2560, 61 L.Ed.2d 197; *Rhode Island v. Innis* (1980), 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297.

{¶ 46} In *Edwards v. Arizona* (1981), 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378, however, the Court noted that a defendant who invokes his right to counsel can then waive this right by initiating contact with the police. The Court in *Edwards* specifically stated that “[h]ad Edwards initiated the meeting on January 20, nothing in the Fifth and Fourteenth Amendments would prohibit the police from merely listening to his voluntary, volunteered statements and using them against him at the trial. The Fifth Amendment right identified in *Miranda* is the right to have counsel present at any custodial interrogation. Absent such interrogation, there would have been no infringement of the right that Edwards invoked and there would be no occasion to determine whether there had been a valid waiver.” *Id.* at 486, citing *Innis* at 298, fn. 2.

{¶ 47} According to Detective Griffin’s testimony, he immediately terminated the interview with appellant once he invoked his right to counsel. It was after multiple attempts by the detective to transport appellant back to the county jail that appellant voluntarily said that the gun was not his and asked who told the detective that appellant shot Witherow. Based on our review of Detective Griffin’s testimony, appellant reinitiated the conversation with the detectives after he had invoked his right to counsel. Accordingly, his unprovoked comments

were not the result of an interrogation, and the trial court properly denied his motion to suppress. Appellant's sixth assignment of error is overruled.

Sufficiency and Manifest Weight of the Evidence

{¶ 48} In his first and second assignments of error, appellant argues that his conviction was based on insufficient evidence and was against the manifest weight of the evidence. Because these concepts are interrelated, we will analyze them together.

{¶ 49} Whether the evidence is legally sufficient to sustain a verdict is a question of law. *State v. Robinson* (1955), 162 Ohio St. 486, 486, 124 N.E.2d 148. Where there is substantial evidence upon which the trier of fact has based its verdict, a reviewing court abuses its discretion in substituting its judgment for that of the trier of fact as to the weight and sufficiency of the evidence. *State v. Nicely* (1988), 39 Ohio St.3d 147, 156, 529 N.E.2d 1236.

{¶ 50} The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact to determine. *State v. DeHass* (1967), 10 Ohio St.2d 230, 231, 227 N.E.2d 212. On review, the appellate court must determine, after viewing the evidence in a light most favorable to the prosecution, whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, 273, 574 N.E.2d 492; *Jackson v. Virginia*, (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560.

{¶ 51} The United States Supreme Court recognized the distinction in considering a claim based upon the manifest weight of the evidence as opposed to sufficiency of that evidence. The Court held in *Tibbs v. Florida* (1982), 457 U.S. 31, 45, 102 S.Ct. 2211, 72 L.Ed.2d 652, that, unlike a reversal based upon the insufficiency of the evidence, an appellate court's disagreement with the jurors' weighing of the evidence does not require special deference accorded verdicts of acquittal. *Id.* at 43. Upon application of the standards enunciated in *Tibbs*, the court in *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717, set forth the proper test to be utilized when addressing the issue of manifest weight of the evidence. The *Martin* court stated that "[t]he court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, 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 720.

{¶ 52} Appellant was convicted of murder in violation of R.C. 2903.02(A), which provides that "[n]o person shall purposely cause the death of another or the unlawful termination of another's pregnancy." Ample evidence was presented to show that appellant purposely caused the death of Kameron Witherow.

{¶ 53} Appellant relies on the fact that there was no physical evidence linking him to the shooting of Witherow. We are not persuaded. Asia and

Thomas Elder both saw appellant with a gun on the day Witherow was shot. Perryman and Brown testified that they saw both Witherow and appellant in the vicinity of the plaza right before hearing gunshots. Michael Stewart saw appellant and Witherow arguing. Stewart then saw appellant pull a gun-shaped object out of his pocket and heard gunshots immediately following. He then saw appellant running away with the gun-shaped object still in his hand. Finally, appellant admitted shooting Witherow to both Delonte Perry and Paul Costello.

{¶ 54} Appellant correctly points out that there was no DNA or other physical evidence placing him at the scene of the crime. He also notes that the gun found in his backpack when he was arrested was not the same weapon used to shoot Witherow. While these arguments are notable, significant evidence was presented that placed appellant at the scene of the crime with a gun-shaped object in his hand. This evidence, viewed in a light most favorable to the prosecution, was sufficient to find appellant guilty of murder.

{¶ 55} In support of his manifest weight argument, appellant relies on the purported errors made by the trial court as alleged in his third, fourth, fifth, and sixth assignments of error. We have already indicated that these errors were harmless at best and in no way refuted the evidence against appellant.

{¶ 56} There are no notable discrepancies in the testimony presented at trial. Each witness was rigorously cross-examined by defense counsel. The statements of these witnesses did not differ from one another in any significant fashion. We have weighed any discrepancies and considered all of the evidence

presented at trial. Based on the magnitude of the evidence presented against appellant, we do not find that there was a manifest miscarriage of justice in this case, and appellant's conviction was not against the manifest weight of the evidence. Appellant's first and second assignments of error are overruled.

Conclusion

{¶ 57} Although the trial court admitted impermissible other acts testimony, this error was harmless because it did not contribute to appellant's conviction. The trial court did not err in allowing Officer Sieger to testify to the veracity of other witnesses because those witnesses also testified and their reliability could be independently ascertained by the jury. In a similar vein, any improper comment made by the prosecution with regard to appellant's failure to testify was rectified by the curative instruction directing the jury to disregard such comment.

{¶ 58} The trial court did not err in denying appellant's motion to suppress any statements made to Detective Griffin because those statements were spontaneously made by appellant after Detective Griffin attempted to terminate the interview. Finally, ample evidence was presented at trial to establish that appellant shot and killed Kameron Witherow on March 5, 2008. The jury did not lose its way, nor was there a manifest miscarriage of justice warranting a reversal of appellant's conviction.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., JUDGE

PATRICIA ANN BLACKMON, P.J., and
ANN DYKE, J., CONCUR

Appendix A

Appellant's six assignments of error:

- I. The trial court erred in denying Appellant's motion for acquittal when the state failed to present sufficient evidence to sustain a conviction.
- II. Appellant's conviction is against the manifest weight of the evidence.
- III. Appellant was denied a fair trial due to prosecutorial misconduct by the assistant prosecutor commenting on Appellant's failure to testify.
- IV. The trial court erred when it admitted other acts testimony in violation of R.C. 2945.59, Evid.R. 404(B) and Appellant's rights under Article I, Section 10 of the Ohio Constitution and the Fourteenth Amendment to the United States Constitution.
- V. Appellant was denied a fair trial by the police officer's improper comments while testifying.
- VI. The trial court erred by denying the motion to suppress statements after Appellant invoked his right to counsel and the police continued interrogating him.

