[Cite as *State v. Boler*, 2010-Ohio-3344.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	Case No. 09CA24
	:	
v.	:	
	:	**DECISION AND**
Phillip Dionte Boler,	:	**JUDGMENT ENTRY**
	:	
Defendant-Appellant.	:	File-stamped date: 7-12-10

APPEARANCES

Timothy Young, Ohio Public Defender, and Spencer Cahoon and Peter Galyardt, Assistant Ohio Public Defenders, Columbus, Ohio, for the Appellant.

C. David Warren, Athens County Prosecutor, and Keller J. Blackburn, Athens County Assistant Prosecutor, Athens, Ohio, for the Appellee.

Kline, J.:

{¶1} Phillip Dionte Boler appeals his felony murder and aggravated robbery convictions in the Athens County Common Pleas Court. On appeal, Boler contends under the plain error doctrine that the prosecutor committed prosecutorial misconduct at closing argument. Because we find no error, let alone plain error, we disagree. Boler next contends that the trial court erroneously admitted certain evidence. Because we find that the trial court did not abuse its discretion, we disagree. Finally, Boler contends that the cumulative error doctrine applies. Because we do not find multiple errors, we disagree. Accordingly, we affirm the judgment of the trial court.

I.

{¶2} The events at issue in this case concern a shooting on February 14, 2009, which resulted in the death of Donnie Putnam. The proof introduced at trial in this case was comprehensive and begins with events that occurred well before the actual shooting. In December 2008, Michael White broke into a residence in Athens, Ohio. After doing so, White proceeded to steal a large number of firearms from the residence.

{¶3} Among the firearms stolen was a .22 Marlin semi-automatic rifle with an optical scope. According to White, he estimated he had stolen 30 or 40 guns. White then sold those guns to Boler and William Osborne as well as several other buyers for $500. Several of the guns used in the shooting came from this robbery.

{¶4} The shootout occurred at a trailer owned by Osborne. According to testimony at trial, Osborne made money dealing marijuana and crack cocaine, but Osborne denied this on the stand. The State's theory was that Boler had supplied Osborne with drugs, and Osborne owed Boler a substantial sum of money.

{¶5} About a week prior to the shooting, William Osborne's son, Shane Benson, heard raised voices engaged in an argument. Benson walked into his father's bedroom to investigate. In that room, Benson saw his father with Boler and another unidentified person. As Benson entered the room, Boler pointed a pistol at him and told him that the argument was none of his business. Benson left the room, and later, as Boler and his associate left, one of them turned and fired a pistol at the floor of the trailer. Evidently, the pistol was loaded with a blank cartridge because later Benson found wadding, but he could not find a bullet hole.

{¶6} Boler made an attempt to confront Osborne about this outstanding debt on the evening of February 13, 2009. Boler and his confederates got into a blue Saturn

vehicle and started to drive to Osborne's trailer. That night, Danny Calhoun, an officer with the Ohio State Highway Patrol, attempted to stop the blue Saturn vehicle because the vehicle's engine was too loud. Initially, the driver of that car would not stop. Eventually he did so, and at that point the driver of the blue Saturn ran in one direction, and three or four passengers ran in a different direction. Calhoun apprehended the driver of the blue Saturn, but Boler and the other occupants of that car managed to escape.

{¶7} Boler apparently decided that he needed another vehicle before he attempted to confront Osborne again. Boler then had Hamda Jama, also known as Honey, purchase a red Mitsubishi Eclipse from Ricky Phillips. The car had a manual transmission, and it also had some problems with its transmission. Honey had no experience driving a manual transmission car. So Jeremy Graber, a neighbor of Phillips, gave Honey a driving lesson. During the lesson, Graber and Honey drove to a trailer. Graber testified that Elijah Mohammed, aka "Halfman," owned the trailer. While he was at the trailer, Graber observed Boler, Honey, Halfman, and Mahat Osman, aka "Taz." Graber also observed a juvenile he could not identify, but the record later established that juvenile was Abdifatah Abdi, aka "D-Block." Halfman was Boler's roommate, and they both engaged in drug trafficking to earn money. Taz and D-Block were individuals Boler brought in from Columbus to help him collect Osborne's debt. Graber also observed both the Marlin .22 rifle and a .40 caliber Smith and Wesson pistol at the trailer. Graber left and eventually made his way home.

{¶8} Later, that same evening, Eric Fussner drove to Halfman and Boler's trailer in order to purchase crack cocaine. Fussner completed this transaction and was getting

ready to leave. As he did so, Boler and the other occupants of the trailer asked him for a ride. Fussner agreed and waited for them. When the occupants took too long in getting ready, Fussner attempted to leave without giving them a ride. As he did so, Halfman drew a pistol and ordered him to stay.

{¶9} Eventually, everyone was ready to leave. There were two cars, Fussner's car and the red Mitsubishi Eclipse Honey had purchased from Ricky Phillips. As they got ready to leave, D-Block started to pull Fussner out of his car, but Boler told D-Block to leave Fussner alone. Apparently, the transmission of the red Eclipse was causing difficulties for its driver either because it was a standard transmission or because it generally had mechanical problems.

{¶10} Boler and Fussner drove the two cars to Osborne's trailer. Fussner was in his car along with Taz and D-Block. Boler was in the red Mitsubishi Eclipse with Honey. When they arrived at the destination, Boler, Taz and D-Block exited the vehicles. Boler carried the .22 Marlin and stated that he would have "his" head in his sights the whole time.

{¶11} Taz and D-Block walked up to Osborne's trailer. That evening Shane Benson and his friend John Perry Junior were in the dining room of the trailer smoking crack cocaine. Benson saw the cars pull into the driveway and then alerted his father. Because of previous incidents, Osborne was concerned that the individuals in the cars wanted to rob him. Earlier that day, Osborne had retrieved several guns and had placed them in readily accessible locations in the trailer. He placed a 9 millimeter semi-automatic pistol on top of the television. He placed an SKS semi-automatic rifle next to the front door. And finally, he leaned a shotgun up against a countertop.

{¶12} Taz and D-Block knocked on the front door. Osborne partially opened it and asked what they wanted. Taz and D-Block demanded to speak with "Johnny." Osborne said that Johnny was not there and that he had children in the trailer. D-Block drew a .40 caliber semi-automatic Smith and Wesson pistol and pressed it against Osborne's gut. Osborne grabbed the pistol and pushed it aside. As the two men struggled over the pistol, D-Block fired the gun twice. Eventually, Osborne manipulated the pistol so that it pointed towards D-Block's head. At this point, D-Block turned and ran letting go of the pistol.

{¶13} The front door of Osborne's trailer opened to the outside. After Osborne wrested the pistol away from D-Block, Osborne stood slightly outside his trailer. Osborne started to point his newly acquired pistol towards the retreating D-Block. Taz then slammed against the front door knocking Osborne against the wall. Osborne shoved the door back open and knocked Taz backwards. Taz also ran from the porch.

{¶14} Osborne then retrieved his SKS semiautomatic rifle and fired several rounds until it jammed. He then fired all of the remaining rounds in the pistol he seized from D-Block. The record is somewhat confused, but it appears to indicate that Taz fired some rounds with an unidentified pistol. John Perry Junior fired four rounds from a 9mm pistol, and Boler fired at least three rounds from the .22 Marlin rifle. Finally, Benson fired at least one shell from a shotgun.

{¶15} During the struggle, Osborne's friend Donnie Putnam arrived on the scene with his girlfriend Misty Swartz. Putnam saw Osborne struggling with two men on his front porch. He got out of his car and started to move towards the porch. A 9mm round struck Putnam during the exchange of gunfire. The bullet entered between the third and

fourth ribs on Putnam's right side. The bullet traveled through Putnam's body downward from his right to left eventually lodging in the soft tissues of the back next to the spine by his eleventh and twelfth ribs of his right side. The bullet punctured the middle and lower lobes of Putnam's right lung.

{¶16} Mortally wounded, Putnam fell to the ground. When the gunfire started, Fussner kept his head down, backed his car out of the driveway, and drove off. As a result, Taz, D-Block, Honey, and Boler all piled into the red Mitsubishi. However, whether due to the inexperience of the driver, the speed of the escape, or mechanical problems, the car crashed shortly after leaving Osborne's trailer. Boler remained in the area of the wreck, but his co-conspirators fled on foot.

{¶17} Paramedics were called to the scene of the shooting. One of the dispatched squads instead encountered the overturned red Mitsubishi. The paramedics eventually found Boler who appeared dazed and confused after the accident. While one of the paramedics was treating Boler, several Athens County Sheriff's officers arrived and arrested Boler. Officers of the Ohio State Highway Patrol eventually apprehended Boler's co-conspirators.

{¶18} In the weeks following his arrest, Lieutenant Cooper of the Athens County Sheriff's Office interviewed Boler twice. At trial, the State would rely heavily on the transcripts of these interviews to prove its case. Additionally, one of the first officers on the scene at Osborne's trailer was Lieutenant Maynard of the Athens County Sheriff's Office. And Maynard's testimony regarding Osborne's statements form the basis for one of Boler's issues on appeal.

{¶19} The jury convicted Boler of aggravated robbery with a firearm specification pursuant to R.C 2941.145 and complicity to murder with a firearm specification pursuant to R.C. 2941.145. The trial court sentenced Boler to a prison term of 15 years to life for the complicity to murder conviction and ten years for the aggravated robbery conviction. Finally, the trial court sentenced Boler to two mandatory 3 years sentences for each firearm specification. The trial court ordered that all counts should run consecutive to each other with the exception of the two specifications, which the trial court ordered Boler to serve concurrently, but consecutively as to the other sentences. From this judgment, Boler appeals and assigns the following error for our review: "The trial court erred by permitting the prosecutor to engage in improper remarks during closing argument in violation of the defendant's due process rights, and by allowing the prosecutor to impermissibly bolster witness testimony with cumulative evidence. Fifth and Fourteenth Amendments to the United States Constitution; Section 16, Article I of the Ohio Constitution; Jury Trial Transcript, June 18, 2009, at 79; Jury Trial Transcript June 11, 2009, at 273; see, also, Jury Trial Transcript citations, infra."

II.

{¶20} Boler raises six separate issues within his sole assignment of error. Four of these issues involve prosecutor misconduct at closing argument. The remaining two issues involve the admission of evidence at trial and the doctrine of cumulative error.

A. Prosecutor Misconduct at Closing Argument

{¶21} Boler failed to object at trial to the alleged errors at closing argument, and as a result, he must demonstrate that those errors satisfy the plain error standard. Crim.R. 52(B); *State v. Slagle* (1992), 65 Ohio St.3d 597, 604.

{¶22} Pursuant to Crim.R. 52(B), we may notice plain errors or defects affecting substantial rights. "Inherent in the rule are three limits placed on reviewing courts for correcting plain error." *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, at ¶15. "'First, there must be an error, *i.e .,* a deviation from the legal rule. * * * Second, the error must be plain. To be 'plain' within the meaning of Crim.R. 52(B), an error must be an 'obvious' defect in the trial proceedings. * * * Third, the error must have affected 'substantial rights.' We have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial.'" Id. at ¶16, quoting *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68 (omissions in original). We will notice plain error "only to prevent a manifest miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91, at paragraph three of syllabus. And "[r]eversal is warranted only if the outcome of the trial clearly would have been different absent the error." *State v. Hill*, 92 Ohio St.3d 191, 203, 2001-Ohio-141, citing *Long*, at paragraph two of the syllabus.

{¶23} "A prosecutor's remarks constitute misconduct if the remarks were improper and if the remarks prejudicially affected an accused's substantial rights." *State v. Williams*, 99 Ohio St.3d 439, 2003-Ohio-4164, at ¶44, citing *State v. Smith* (1984), 14 Ohio St.3d 13, 14.

{¶24} Prosecutorial misconduct will not provide a basis for reversal unless the misconduct can be said to have deprived the appellant of a fair trial based on the entire record. *State v. Harp*, Adams App. No. 07CA848, 2008-Ohio-3703, at ¶20, citing *State v. Lott* (1990), 51 Ohio St.3d 160, 166. "The touchstone of analysis 'is the fairness of the trial, not the culpability of the prosecutor.'" *State v. Gapen*, 104 Ohio St.3d 358, 2004-Ohio-6548, at ¶92, quoting *Smith v. Phillips* (1982), 455 U.S. 209, 219. We must

"view the state's closing argument in its entirety to determine whether the allegedly improper remarks were prejudicial." *State v. Treesh*, 90 Ohio St.3d 460, 466, 2001-Ohio-4, citing *State v. Moritz* (1980), 63 Ohio St.2d 150, 157. We note that "[t]he prosecution is normally entitled to a certain degree of latitude in its concluding remarks." *Smith*, 14 Ohio St.3d at 13, citing *State v. Woodards* (1966), 6 Ohio St.2d 14, 26; *State v. Liberatore* (1982), 69 Ohio St.2d 583, 589. A prosecutor "may strike hard blows, [but] he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. United States* (1935), 295 U.S. 78, 88.

1.

{¶25} Boler first contends that the prosecutor violated his rights by unequivocally declaring that he was guilty during closing argument.

{¶26} "It is improper for an attorney to express his personal belief or opinion as to the credibility of a witness or as to the guilt of the accused." *Smith*, 14 Ohio St.3d at 14, citing *State v. Thayer* (1931), 124 Ohio St. 1. However, "isolated comments by a prosecutor are not to be taken out of context and given their most damaging meaning." *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, at ¶94, citing *Donnelly v. DeChristoforo* (1974), 416 U.S. 637, 647.

{¶27} Boler identifies two passages that he contends consisted of prosecutorial misconduct along these lines. However, the State contends that the prosecutor merely argued a conclusion of guilt based upon the evidence admitted in the case.

{¶28} First, "[t]he defendant is guilty. The facts meet the elements. It does not matter for the murder charge who shot Donnie Putnam." Trial Transcript, June 18, 2009, at 79-80.

{¶29} This statement follows a lengthy passage in which the prosecutor argued that the jury had to believe and disbelieve witnesses in an odd and improbable fashion in order to credit the arguments of Boler's counsel. In context, the prosecution is merely arguing that the jury should more reasonably believe the State's case, and that because the facts established by the State's case meet the elements, the jury should return a verdict of guilty. As such, we conclude that these arguments do not constitute prosecutorial misconduct.

{¶30} Second, "[i]t's the defendant's fault. It's the defendant who put [the event] in action." Trial Transcript, June 18, 2009, at 105.

{¶31} In his closing arguments, Boler's counsel argued that, because John Perry Junior shot Putnam, the aggravated robbery did not cause Putnam's murder. Trial Transcript, June 18, 2009, at 56. The statements of the prosecution that Boler points to are merely an argument that the aggravated robbery proximately caused the killing. In context, the prosecutor is not arguing or inviting the jury to conclude that Boler is guilty because the prosecutor believed that Boler was guilty. Rather, the prosecutor is specifically addressing a legal argument that defense counsel raised during his closing argument. Again, we find that these comments do not constitute prosecutorial misconduct.

{¶32} Therefore, we do not find any error, let alone plain error.

{¶33} Boler next contends that the prosecutor impermissibly presented facts not in evidence during closing argument. "'Where opinions [on guilt] are expressed on facts outside the evidence, or are predicated on inferences based on facts outside the evidence, such opinions have not been countenanced and the judgments in those cases have been reversed upon appeal.'" *Lott* at 166, quoting *State v. Stephens* (1970), 24 Ohio St.2d 76, 83 (alteration sic). "However, where the reference to matters outside the record is short, oblique, and justified as a reply to defense arguments and elicits no contemporaneous objection, there is no prejudicial error." *Lott* at 166, citing *State v. Watson* (1969), 20 Ohio App.2d 115, paragraph two of the syllabus.

{¶34} First, Boler contends that the prosecutor argued that either Taz or D-Block must have fired the fatal shot. And Boler contends that there is no evidence in the record to support this theory.

{¶35} In closing arguments, a prosecutor may rely on reasonable inferences as well as facts directly established through evidence. See *State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, at ¶205, quoting *State v. Smith*, 80 Ohio St.3d 89, 111, 1997-Ohio-355. Here, the evidence established that the gun that killed Donnie Putnam was a 9mm Highpoint pistol. Of the occupants of Osborne's trailer, only John Perry Junior had such a weapon. The State's experts testified that they identified four bullet casings in the trailer that may have been caused by John Perry Junior firing such a weapon. When John Perry Junior turned himself in, he also turned in a 9mm Highpoint pistol. Trial Transcript, June 16, 2009, at 81-82. A tool mark expert from the Bureau of Criminal Identification testified that this pistol was not the one which killed Donnie Putnam. Trial Transcript, June 12, 2009, at 105. We note, however, that Osborne possessed two

Highpoint 9mm pistols. The second of which was never introduced at trial and was presumably not recovered.

{¶36} The prosecutor's argument that one of Boler's confederates shot Donnie Putnam relies in no small part on the orientation of the combatants and the nature of the wound. For the purposes of explaining the orientation of the individuals involved, we shall describe them from the perspective of an individual standing at the front door of Osborne's trailer. The trailer is rectangular, and the front door of the trailer is located roughly in the middle of the structure on one of the longer exterior walls. See State's Exhibit 2. The longer dimension of the trailer was parallel to the main road. See State's Exhibits 408, 389. The driveway extended diagonally from this main road. Id. So an individual looking out of Osborne's front door would see sides of the trailer extending to his right and left, and he would face the road. The driveway would extend from the road to the trailer diagonally on his right hand side. Id. Swartz and Osborne both testified that Donnie Putnam parked his car very close to corner of the trailer, which would be on our observer's right hand side. Id. Fussner had parked his car, the one Taz and D-Block had exited, closer to the road. Trial Transcript, June 11, 2009, 155-56; State's Exhibit 2. And the red Mitsubishi Eclipse had been parked on the road. State's Exhibits 408, 389.

{¶37} The State's theory was that Donnie Putnam was shot as he advanced from the right hand corner of Osborne's trailer. As noted above, the bullet entered the right hand side of his body. Trial Transcript, June 8, 2009, 46. The forensic pathologist testified that "the gun would possibly, likely have been to the right side of the victim." Id. at 42.

{¶38} Misty Swartz testified that when Donnie Putnam arrived he walked towards the front door of Osborne's trailer. Trial Transcript, Testimony of Misty Swartz, page 8. According to Osborne, Donnie Putnam fell near a grill, and this grill was next to the front right exterior wall of the trailer. Trial Transcript, June 11, 2009, 188; State's Exhibit 389. The State argued that as Donnie Putnam advanced, Taz and D-Block retreated towards the cars and the road. This left Boler and his co-conspirators to Donnie Putnam's right. Osborne and his family in the trailer would have been either straight ahead or to Donnie Putnam's left.

{¶39} It is a reasonable inference from this set of facts that someone other than John Perry Junior must have fired the fatal shot. Boler's confederates had ample opportunity to dispose of any incriminating firearms after the shooting. Therefore, the location of Boler and his confederates in the firefight leads to the plausible conclusion that one of them may have fired the fatal round.

{¶40} Defense counsel credibly argued that John Perry Junior shot and killed Donnie Putnam. But the fact that there are other potential explanations of the evidence does not render the prosecution's interpretation unreasonable or impermissible. As such, the prosecutor committed no misconduct in making this argument.

{¶41} Second, Boler contends that the prosecution claimed that Boler said he was going to take Osborne's guns away from Osborne in payment for a debt. Boler contends that the record does not support such a theory. However, the State introduced transcripts of Boler's statements to the police into evidence. During the second interview, Boler stated the following:

{¶42} "Boler: Cause the goods [Osborne] got. . .he's own guns that he was shootin at me with. . .he owe em to me. He probably just got em off the pawn shop.

{¶43} Cooper: So [Osborne] was gonna give you his guns to pay off his bill?

{¶44} Boler: Yes.

{¶45} Cooper: Whatta you do with all the guns?

{¶46} Boler: Sell em." Transcript of Boler's Interview on Thursday, February 19, 2009 at 48.

{¶47} In reviewing the record, we find that the record supports the prosecutor's argument that Boler intended to seize Osborne's guns in payment for Osborne's debt.

{¶48} Therefore, we do not find any error, let alone plain error.

3.

{¶49} Boler next contends that the prosecution committed misconduct by using highly prejudicial language during closing argument. Boler identifies statements that he contends establish prosecutorial misconduct in that the prosecution attempted to appeal to the jury's emotions instead of having the jury rely on the evidence.

{¶50} First, Boler points to the following statement of the prosecutor: "regarding our witnesses, you cannot expect angels to be witnesses to schemes that are hatched in hell. We [take] the witnesses as we find them." Trial Transcript, June 18, 2009, at 21. Boler argues that this "language was aimed to appeal to the jury's emotions instead of having the jury rely on the facts." Boler's Brief at 9. However, in context, the prosecutor was referring to the State's own witnesses, and was justifying its use of witnesses with less than perfect backgrounds. The point the prosecutor was making is that ordinarily only criminals will be party to a criminal conspiracy, and the jury should not expect the

State's witnesses to be untainted by criminality. In context, this argument is within the scope of permissible closing argument.

{¶51} Second, Boler points to the following statements of the prosecutor: "Donnie sees his friend struggling with two black men"; "He went to the porch because there were two black men in a struggle with his friends." Trial Transcript, June 18, 2009, at 80. Boler contends that this served to invite the jury to render a verdict based on prejudice or bias. However, we find that the prosecutor merely used black as a description, and in context the prosecutor did not invite the jury to base its decision on prejudice or bigotry. See *United States v. Young* (C.A.6, 2009), 347 Fed.Appx. 182, 190-91 (finding an isolated comment about an individual's predilection for white females not intended to mislead the jury or prejudice the defendant); *State v. Trammell* (Feb. 1, 1999), Stark App. No. 1998CA00026 (court rejects defendant's contention that the prosecutor exceeded permitted bounds by arguing that an officer would not beat up two black men he had information had just engaged in a drug transaction); *State v. Holsinger* (Jun. 28, 1989), Highland App. No. 682 (prosecutor's use of ethnic slurs in closing argument that the defendant had uttered was not gross misconduct in arguing that the defendant's racism motivated him). These comments were isolated, and there is nothing in the record to indicate that the prosecution intended them as anything other than descriptive. We find that they do not rise to the level of prosecutorial misconduct.

{¶52} Therefore, we do not find any error, let alone plain error.

4.

{¶53} Boler next contends that the prosecution impermissibly repeated derogatory language about Mr. Boler and his alleged accomplices. Boler states that he referred to

his alleged accomplices as “thugs from the street” once, and the prosecutor proceeded to use the words thugs and goons at least 38 times during his closing argument. Boler cites *Liberatore* in his argument that this constituted prosecutorial misconduct.

{¶54} However, we find *Liberatore* distinguishable for several reasons. First, the *Liberatore* court found the use of the word “goons” as impermissible “in view of the highly objectionable nature of the entire closing argument.” *Liberatore* at 590, fn. 9. The *Liberatore* Court found that the prosecutor had “repeatedly referred to Mata’s oral statement as if it was substantive evidence; commented at length on inferences to be drawn from facts not in evidence; characterized the defendant in derogatory terms clearly designed to inflame the jury; and expressed personal opinions as to the credibility of the witness Mata and the guilt of the accused.” Id. at 589-90 (footnotes omitted). For the reasons we have laid out above and below, we do not find that the prosecutor’s closing argument in this case is so rife with errors.

{¶55} In addition, the defendant characterized his associates as thugs during his interview with Cooper. This is probative evidence, not of character but of the defendant’s intent. The State’s theory of the case was that Boler had committed felony murder. Boler engaged in an offense of violence that was a felony of the first or second degree, and as a proximate result Donnie Putnam was killed. See R.C. 2903.02(B). That Boler sought the assistance of individuals he characterized as thugs certainly is probative of Boler’s intent. The prosecution, among other things, had to prove that Boler committed the underlying felony, here complicity to aggravated robbery in violation of R.C. 2911.01. In order to prove complicity, the State had to show that Boler knowingly solicited or procured another individual to commit the aggravated robbery.

R.C. 2923.03(A)(1); see, also, R.C. 2913.02(A) (indicating that "knowingly" is the relevant mens rea for a theft offense). Certainly, evidence that Boler considered Taz and D-Block to be "thugs" is relevant evidence to Boler's intentions on the night in question.

{¶56} Having read the entirety of the closing, we conclude that the prosecutor's use of the defendant's own words "was a harsh characterization, [but] it was within the latitude accorded the prosecutor in closing argument." *State v. Stroud*, Montgomery App. No. 18713, 2002-Ohio-940.

{¶57} Therefore, we do not find any error, let alone plain error.

5. Conclusion Regarding Closing Argument

{¶58} We do not find prosecutor misconduct as it relates to closing argument. That is, after reviewing the entire record, we cannot say that Boler was deprived of a fair trial. Further, we do not find any error, let alone plain error on this issue. And even if we assume error, we do not find error, which is plain and affects Boler's substantial rights.

B. Evidence at Trial

{¶59} Boler contends that the prosecutors impermissibly bolstered the testimony of certain witnesses as well as needlessly duplicated the admission of Boler's interviews with Lieutenant Cooper. Boler identifies a series of passages in the trial transcript, each of which he contends demonstrates the prosecution either introduced needlessly cumulative evidence or introduced an impermissible prior consistent statement.

{¶60} "'The admission or exclusion of relevant evidence rests within the sound discretion of the trial court' and we may not reverse unless there has been an abuse of

that discretion." *State v. Boyd*, Athens App. No. 09CA14, 2010-Ohio-1605, at ¶27, quoting *State v. Sage* (1987), 31 Ohio St.3d 173, at paragraph two of the syllabus.

{¶61} First, Boler contends that the prosecutors impermissibly bolstered their witnesses' statements by introducing prior consistent statements. In the first transcript passage Boler cites, the State introduced Osborne's account of the shooting as heard by Lieutenant Maynard.

{¶62} "Q: Okay. What were his initial statements to you about what had happened?

{¶63} A: Uh he told me he was robbed.

{¶64} Q: Okay.

{¶65} A: He said that that a dark-skinned man was on his porch and confronted him at the door and Mr. Osborne said he came to the door with an automatic weapon. Um, he said when he answered the door the gentleman had a uh a black handgun. He said he physically grabbed the handgun and a physical altercation took place in the doorway. Um he stated that at one point both of their arms went in the air and the gun went off straight in the air above the trailer and at that point suspect, suspects, began to flee the area. He said he returned fire with his automatic weapon 'til it jammed. And then he stated when that jammed, he picked up the black hand gun that was left at the scene and began returning fire at uh the suspects that were at the house.

{¶66} Q: Okay. Did he give you a description or did he say whether he knew the people or knew the people on the porch?

{¶67} * * *

{¶68} A: He said he knew that they lived in the New Marshfield area." Trial Transcript, June 11, 2009, at 273-74.

{¶69} Boler argues that this statement was a prior consistent statement, and the statement was not admissible because there was no intervening motive for Osbourne to lie. The law of evidence generally prohibits the admission of hearsay. Evid.R. 802. Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C).

{¶70} But "[a] statement is not hearsay if: * * * The declarant testifies at trial or hearing and is subject to cross-examination concerning the statement, and the statement is * * * consistent with declarant's testimony and is offered to rebut an express or implied charge against declarant of recent fabrication or improper influence or motive[.]" Evid.R. 801(D)(1)(b). "What the rule permits is the rehabilitation of a witness whose credibility has been attacked by means of a charge that he recently fabricated his story or falsified his testimony in response to improper motivation or influence, by admitting into evidence a consistent statement made by the witness prior to the time of the suggested invention or of the emergence of the motive or influence to invent or falsify, as tending to rebut the charge." *Motorists Mut. Ins. Co. v. Vance* (1985), 21 Ohio App.3d 205, 207.

{¶71} The prosecution argues that the trial court admitted this evidence as an excited utterance under Evid.R. 803(2). This provision allows for the admission of a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Evid.R. 803(2). The

Supreme Court of Ohio has established a four part test to determine whether a statement constitutes an excited utterance: "'(a) that there was some occurrence startling enough to * * * render his statement or declaration spontaneous and unreflective, (b) that the statement or declaration * * * was made before * * * such nervous excitement [lost] a domination over his reflective faculties, so that such domination * * * [made] his statements and declarations the unreflective and sincere expression of his actual impressions and beliefs, (c) that the statement or declaration related to such startling occurrence or the circumstances of such startling occurrence, and (d) that the declarant had an opportunity to observe personally the matters asserted in his statement or declaration.'" *State v. Wallace* (1988), 37 Ohio St.3d 87, 89, quoting *Potter v. Baker* (1955), 162 Ohio St. 488, paragraph two of the syllabus.

{¶72} There can be scarcely any question of the first, third, or fourth requirements here. It is uncontested that Osborne observed a shooting that resulted in the death of Donnie Putnam. Nor can there be any doubt that this is a sufficiently startling event to create nervous excitement. Finally, the statement was a very brief narrative of the events at issue. The only question is whether Osborne remained under the influence of the excitement at the time he gave the statement.

{¶73} According to the record, Osborne made the statements within a short period of time of the shooting, and Lieutenant Maynard testified that Osborne's state was excited. Jury Trial Transcript, June 11, 2009, at 269-74. We cannot say that the trial court abused its discretion in admitting this evidence. See *State v. Root*, Ashtabula App. No. 2003-A-0043, 2004-Ohio-2439, at ¶21; *State v. Gough*, Licking App. No. 2004CA00022, 2004-Ohio-4550, at ¶29; *State v. Hoehn*, Medina App. No. 03CA0076-

M, 2004-Ohio-1419, at ¶21. See, also, *State v. Dempsey*, Clark App. No. 2003-CA-42, 2004-Ohio-163, at ¶25-26.

{¶74} Boler next contends that the trial court erred by allowing the prosecution to needlessly cumulate evidence. Boler points to a series of passages in the trial transcript where Lieutenant Cooper repeats statements that Boler made during two interviews with Cooper. Boler contends that Cooper's "testimony, by repeating the contents of the audio tapes reinforced their content and improperly bolstered evidence for the jury."

{¶75} In reviewing the cited passages, we find that Cooper reasonably characterized the nature of the statements Boler gave in the interview. In fact, the nature of Boler's brief presumes this. Cooper's testimony is only needlessly cumulative to the extent it is the same as the transcripts and tapes later admitted into evidence.

{¶76} We note that the mere fact Cooper's testimony in some ways duplicates the tapes and transcripts does not mean that the trial court should have excluded this evidence. Rather, Evid.R. 403(B) only requires exclusion where the needless cumulation substantially outweighs the evidence's probative value. While there was certainly some duplication, after review, we find that it was not to such an extent as to significantly alter the trial.

{¶77} Therefore, we do not find that the trial court abused its discretion when it overruled Boler's objections and allowed the admission of the above evidence.

C. Cumulative Error Doctrine

{¶78} Boler does not label his final "issue" on appeal as being an argument based on the cumulative error doctrine, but that is the gist of his brief.

{¶79} Under the cumulative error doctrine, "a conviction will be reversed where the cumulative effect of errors in a trial deprives a defendant of the constitutional right to a fair trial even though each of numerous instances of trial court error does not individually constitute cause for reversal." *State v. Garner*, 74 Ohio St.3d 49, 64, 1995-Ohio-168; *State v. DeMarco* (1987), 31 Ohio St.3d 191, paragraph two of the syllabus. However, we have previously rejected each of his issues because we found no error. "If, however, a reviewing court finds no prior instances of error, then the doctrine has no application." *State v. McKnight*, Vinton App. No. 07CA665, 2008-Ohio-2435, at ¶108; *State v. Hairston*, Scioto App. No. 06CA3089, 2007-Ohio-3707, at ¶41. Consequently, we find that the cumulative error doctrine does not apply.

III.

{¶80} Accordingly, for the foregoing reasons, we overrule Boler's sole assignment of error and affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED, and Appellant shall pay the 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 Athens County Common Pleas Court to carry this judgment into execution.

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

McFarland, P.J. and Harsha, J.: Concur in Judgment and Opinion.

For the Court

BY:_____
Roger L. Kline, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.