[Cite as *State v. Phillips,* 2018-Ohio-5432.]

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

STATE OF OHIO,	:	Case No. 18CA3832
Plaintiff-Appellee,	:	
v.	:	DECISION AND JUDGMENT ENTRY
CHAD PHILLIPS,	:	**RELEASED: 12/21/2018**
Defendant-Appellant.	:	

APPEARANCES:

Matthew F. Loesch, Portsmouth, Ohio, for appellant.

Shane A. Tieman, Scioto County Prosecuting Attorney, and Jay Willis, Scioto County Assistant Prosecuting Attorney, Portsmouth, Ohio, for appellee.

Harsha, J.

{¶1} After a jury convicted Chad Phillips of aggravated murder and other felonies against his mother, the trial court sentenced him to life in prison with the possibility of parole after 30 years. Philips asserts that his conviction for aggravated murder was not supported by sufficient evidence and was against the manifest weight of the evidence because the state failed to prove he acted with prior calculation and design.

{¶2} However, Phillips ignores evidence that days before he killed his mother, a neighbor overheard an argument between the two. And when he was interrogated after the murder, Phillips confessed to hitting his mother repeatedly with a walking stick while asking her to repent for her sins; and he admitted that the anger for his mother had "built up" over time. Phillips's son, Devon, testified that he observed "[k]ind of a lot" of arguments between Phillips and his mother in the few days before her death. And Phillips's brother, Shannon, testified that after the murder he found Phillips's

handwritten letter under their mother's day planner; the letter stated that he, his mother, and his son would all be in heaven in two days. The jury could reasonably conclude beyond a reasonable doubt this evidence established that Phillips's actions were made with prior calculation and design, i.e., they went beyond a momentary impulse, and showed that he was determined to complete a specific course of action. Phillips's aggravated-murder conviction is supported by sufficient evidence and is not against the manifest weight of the evidence.

{¶3} Next Phillips contends that in the state's closing argument the assistant prosecuting attorney inappropriately stated his personal opinion on the credibility of one of the state's witnesses. Because Phillips's trial counsel did not object, he forfeited all but plain error, which does not exist here. Granted, the assistant prosecutor improperly expressed his personal opinion that he "found" Devon "extremely creditable." However this isolated statement did not prejudicially affect Phillips's substantial rights due to the overwhelming evidence adduced during the entire trial, e.g., Phillips confessed to beating his mother, he argued with her in the days leading up to her death, he wrote a note that they would all be dead in a few days, he was found at the scene of the murder with her blood on his hands and ring, as well as on his sweatpants, and he threatened to kill a paramedic "like he did his mother."

{¶4} For similar reasons, we reject Phillips's claim that trial counsel provided him with ineffective assistance by failing to object to the assistant prosecutor's vouching.

{¶5} Phillips also contends that the trial court abused its discretion in admitting hearsay evidence from Tina Whitt. She testified to what Devon told her on the day of

the murder after he discovered his grandmother's body on their back porch. We reject this contention because Devon's statements to Whitt fit within the excited-utterance exception to the general prohibition against hearsay evidence: (1) the beating of his grandmother was startling enough to produce a nervous excitement in Devon; (2) Devon made his statements to Whitt within a few minutes after Devon had seen his grandmother's bloody body; (3) the statements related to the startling event; and (4) Devon, the declarant, had firsthand knowledge of the events that are the subject of the hearsay. In addition, Devon later testified to these same statements and was subject to cross-examination.

{¶6} Phillips also argues that the trial court abused its discretion by admitting prior domestic-violence convictions against him. He contends the domestic-violence charge against him was "superfluous" and was brought against him for the sole reason of introducing his prior domestic-violence convictions to prejudice him and mislead the jury. Although he objected to the introduction of these convictions during testimony about them, Phillips's trial counsel ultimately did not object to the admission of the certified copies of the convictions. More importantly, the trial court did not err, much less plainly err, by admitting them because they were required for the state to meet its burden of proof to elevate the domestic-violence charge to a felony.

{¶7} Additionally, Phillips asserts that the trial court improperly instructed the jury concerning his competency and sanity after he withdrew his plea of not guilty by reason of insanity. The trial court had no obligation to instruct the jury on the issues of Phillips's competency and sanity; however, it did not err in doing so. The instruction constituted an accurate statement and it clarified any potential confusion by the jury

after it heard Phillips's statements that he was doing God's will when he beat his mother with the staff. Nor could any error in this instruction have prejudiced him considering the overwhelming evidence against him, including his inculpatory statements and the physical evidence tying him to the crime.

{¶8} Next Phillips contends that the trial court abused its discretion by admitting evidence concerning the arguments he had with his mother, i.e. the probative value of this testimony was substantially outweighed by its prejudicial effect. But the trial court did not abuse its broad discretion in permitting this evidence because it was relevant to the element of prior calculation and design, and provided a motive for the crimes. The court correctly concluded that the probative value of this important evidence was not substantially outweighed by the danger of its unfair prejudice.

{¶9} Finally, Phillips claims that cumulative errors committed during his trial deprived him of a fair trial and require a reversal of his convictions. The cumulative-error doctrine is inapplicable here because there are no multiple instances of otherwise harmless error.

{¶10} We overrule Phillips's assignments of error and affirm his aggravated-murder conviction.

I. FACTS

{¶11} The Scioto County Grand Jury returned an indictment charging Chad Phillips ("Phillips") with aggravated murder, murder, felonious assault, and domestic violence in connection with the beating, strangulation, and death of his mother, Loretta Halcomb, on November 21, 2016. The domestic-violence charge alleged that he had twice been previously convicted of domestic violence. Phillips's appointed counsel

entered pleas of not guilty and not guilty by reason of insanity. Following evaluations and a hearing the trial court found Phillips competent to stand trial; Phillips withdrew his plea of not guilty by reason of insanity.

{¶12} At the jury trial Tina Whitt, a school bus driver for the local school district, testified that on the afternoon of the murder she dropped off student Devon Phillips, who is Chad Phillips's son and Loretta Halcomb's grandson, near the house where they lived. On her return route she passed by the house again and saw Devon sitting on the front porch, while his father, Phillips, was laying on his stomach in the front yard, near a long walking stick. Whitt also noticed that Phillips's hands were red and he was breathing rapidly. She asked Devon if everything was okay; he told her yes, and that his dad was just acting or talking crazy. When Whitt asked if his grandmother was ok, Devon said yes, but Whitt decided to have the school call the grandmother. When there was no answer, she asked Devon to find his grandmother; after he couldn't find her in the house, she told him to check the back of the house. He then came back to the bus and was "pretty hysterical," "screaming" that his grandmother was laying in the back of the house covered in blood. She then put Devon on the bus; after a few minutes, he mentioned to her that although his grandmother did not speak to him when he saw her, she raised her hand up to him.

{¶13} Phillips's son, Devon, corroborated Whitt's testimony. He testified that after he was dropped off from the bus, he saw Phillips laying in the grass in the front yard. Phillips told Devon to "wait for the angels to come," so Devon waited on a bench on the front porch. The week before Phillips had told Devon about dying soon. Later, after Whitt returned to their home she asked Devon to look for his grandmother, who

Devon found covered in blood on the back porch. Devon ran back to the bus, got on, and rode to the high school. According to Devon, in the few days before the murder, he had witnessed "[k]ind of a lot" of arguments between his father and his grandmother, mostly about money.

{¶14} Whitt contacted her supervisor, Butch Cook, who called 911. Cook arrived at the scene around the same time that Scioto County Sheriff Deputy Andrew Drake did. They saw Phillips now in the back yard, and he appeared to be unconscious. Deputy Sheriff Drake also observed blood on Phillips's hands and ring. Emergency personnel arrived and administered Narcan to Phillips because they thought he might be having a drug overdose. Deputy Sheriff Drake testified that he later discovered Loretta Halcomb, laying on the back deck with her upper body through the railing; she was covered in blood and pieces of a walking stick were found near her body. The deputy recognized the staff as a walking stick Phillips had with him when the deputy encountered him a couple weeks earlier. Both Phillips and his grandmother were taken to Southern Ohio Medical Center for treatment. Halcomb later died from her injuries. Two emergency personnel testified that while transporting Phillips to the hospital, he threatened one of them that if he did not repent, he would kill him "like he did his mother." Phillips tested positive for marijuana and opiates.

{¶15} After being treated and released from the hospital later that night, Phillips was transported to the sheriff's office, where Detective Matt Spencer Mirandized and interviewed him. During the interview Phillips mentioned that he had been saved in 2013, suggested that his mom had abused children, and stated that the incident

occurred because it had "built up" over time. He claimed that he had been doing God's will. He then confessed to hitting his mother repeatedly with a walking stick:

> PHIILIPS: I waited outside. I went outside, and I started moving sporadically, and I had my mom's staff, then I started moving (inaudible), and I was like, what in the world, hearing this music, like I was air drumming, and then I remember, bam, saying, please mom, you need to repent.
>
> SPENCER: Yeah.
>
> PHILLIPS: God is telling you to repent, and then, ahh, she screamed at me. (Inaudible)
>
> SPENCER: Is that when you hit her with it?
>
> PHILLIPS: Yeah.
>
> SPENCER: How many times you think you hit her?
>
> PHILLIPS: Brother, I don't [know].

{¶16} One neighbor testified that he had overheard an argument between Phillips and his mother a day or two before the murder, and another neighbor testified that she had seen Phillips with two different walking sticks on the day of the murder. A friend of Phillips testified that the day before he heard about the murder, Phillips gave him some clothes and asked him to be a pallbearer at his funeral.

{¶17} Phillips's brother, Shannon, testified that the day after the murder, he went to Phillips's house and found a letter in Phillips's handwriting under their mother's day planner. In the letter Phillips wrote that he "can't wait to see you in two days because we will be in heaven." Shannon denied any claimed abuse by their mother.

{¶18} Dr. Susan Allen conducted an autopsy of Halcomb and concluded that she died as a result of multiple blunt force injuries and strangulation. Sarah Grimsley, a forensic scientist with the Ohio Bureau of Criminal Investigation, testified that she tested

blood samples from the crime scene and found blood with Halcomb's DNA on the sweatpants Phillips had been wearing on the day of the murder, as well as on the samples taken from the blood on Phillips's hands and ring. Kasey Boone, who was Phillips's probation officer, testified that Phillips was on electronic home monitoring at the time of the murder and wore a GPS bracelet on his ankle. The tracking evidence recorded Phillips moving from the front of the house, through the house, and to the back and side yard.

{¶19} After the state rested its case the defense called one witness—Phillips. He testified that that he had been saved in 2013, that he had made several walking sticks, for himself, his mother, and his sons, and that he did not have any argument or fight with his mother in the days leading up to her death. Phillips claimed that he was in his bedroom reading his Bible when he heard his mother scream his name. According to Phillips he saw two men attacking his mother. He fought with the intruders, saw his mother was still breathing, and then tried to run to a neighbor's house to ask for help. But he fell in the front yard and lost consciousness until the police and emergency personnel arrived. He claimed that he did not write the letter that his brother found. He also denied that his mother had ever abused anyone.

{¶20} The jury returned verdicts finding Phillips guilty of each of the charged offenses. After the trial court concluded that the charges were allied offenses of similar import, the state elected to proceed with sentencing on the aggravated-murder conviction. The trial court sentenced Phillips to life imprisonment with parole eligibility after 30 years.

II. ASSIGNMENTS OF ERROR

{¶21} Phillips assigns the following errors for our review:

1. DEFENDANT'S CONVICTION FOR AGGRAVATED MURDER WAS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE.

2. THERE WERE IMPROPER COMMENTS MADE BY THE PROSECUTOR IN ITS CLOSING ARGUMENT.

3. APPELLANT'S COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE IMPROPER COMMENTS OF THE PROSECUTOR.

4. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING IMPROPER HEARSAY EVIDENCE.

5. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING PRIOR CONVICTIONS AGAINST THE APPELLANT.

6. THE TRIAL COURT IMPROPERLY INSTRUCTED THE JURY WHEN IT INCLUDED AN INSTRUCTION REGARDING APPELLANT'S COMPETENCE AND SANITY.

7. THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING TESTIMONY REGARDING ALLEGED ARGUMENTS BETWEEN APPELLANT AND THE DECEDENT.

8. CUMULATIVE ERRORS DURING APPELLANT'S TRIAL DENIED HIM OF HIS RIGHT TO A FAIR TRIAL.

III. LAW AND ANALYSIS

A. Sufficiency and Manifest Weight of the Evidence

{¶22} In his first assignment of error Phillips asserts that his aggravated-murder conviction was not supported by sufficient evidence and was against the manifest weight of the evidence.

1. Standard of Review

{¶23} "When a court reviews the record for sufficiency, '[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond

a reasonable doubt.' " *State v. Maxwell*, 139 Ohio St.3d 12, 9 N.E.3d 930, ¶ 146, 2014-Ohio-1019, quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus; *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). A sufficiency assignment of error challenges the legal adequacy of the state's prima facie case, not its rational persuasiveness. *State v. Koon*, 4th Dist. Hocking No. 15CA17, 2016-Ohio-416, ¶ 17. "That limited review does not intrude on the jury's role 'to resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.' " *Musacchio v. United States*, ––– U.S. ––––, 136 S.Ct. 709, 715, 193 L.Ed.2d 639 (2016), quoting *Jackson* at 319, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560.

{¶24} By contrast in determining whether a criminal conviction is against the manifest weight of the evidence, we 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 we must reverse the conviction. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997); *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 119. To satisfy its burden of proof, the state must present enough substantial credible evidence to allow the trier of fact to conclude that the state had proven all the essential elements of the offense beyond a reasonable doubt. *See State v. Adams*, 2016-Ohio-7772, 84 N.E.3d 155, ¶ 22 (4th Dist.) citing *State v. Eley*, 56 Ohio St.2d 169, 383 N.E.2d 132 (1978), syllabus, (superseded by state constitutional amendment on other grounds in *State v. Smith*, 80 Ohio St.3d 89, 684 N.E.2d 668 (1997)).

{¶25} Although a court of appeals may determine that a judgment of a trial court is sustained by sufficient evidence, that court may nevertheless conclude that the judgment is against the weight of the evidence. *Thompkins* at 387, 78 Ohio St.3d 380, 678 N.E.2d 541. However, we are reminded that generally, it is the role of the jury to determine the weight and credibility of evidence. *See Kirkland*, 140 Ohio St.3d 73, 2014-Ohio-1966, 15 N.E.3d 818, at ¶ 132. " 'A jury, sitting as the trier of fact, is free to believe all, part or none of the testimony of any witness who appears before it.' " *State v. Reyes-Rosales*, 4th Dist. Adams No. 15CA1010, 2016-Ohio-3338, ¶ 17, quoting *State v. West*, 4th Dist. Scioto No. 12CA3507, 2014-Ohio-1941, ¶ 23. We defer to the trier of fact on these evidentiary weight and credibility issues because it is in the best position to gauge the witnesses' demeanor, gestures, and voice inflections, and to use these observations to weigh their credibility. *Id.*; *State v. Koon*, 4th Dist. Hocking No. 15CA17, 2016-Ohio-416, ¶ 18.

{¶26} Moreover, "[w]hen an appellate court concludes that the weight of the evidence supports a defendant's conviction, this conclusion necessarily also includes a finding that sufficient evidence supports the conviction." *State v. Adkins*, 4th Dist. Lawrence No. 13CA17, 2014-Ohio-3389, ¶ 27. "Thus, a determination that [a] conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency." *State v. Puckett*, 191 Ohio App.3d 747, 2010-Ohio-6597, 947 N.E.2d 730, ¶ 34 (4th Dist.).

2. Prior Calculation and Design

{¶27} The jury convicted Phillips of aggravated murder in violation of R.C. 2923.01(A), which provides that "[n]o person shall purposely, and with prior calculation

and design, cause the death of another * * *."[1] Phillips does not contest that the state established that he purposely caused the death of his mother. Instead, he claims only that the state did not introduce sufficient evidence that he acted with prior calculation and design. Alternatively he argues that the jury's finding that he acted with prior calculation and design in killing his mother was against the manifest weight of the evidence.

{¶28} "The phrase 'prior calculation and design' by its own terms suggests advance reasoning to formulate the purpose to kill. Evidence of an act committed on the spur of the moment or after momentary consideration is not evidence of a premeditated decision or a studied consideration of the method and the means to cause a death." *State v. Walker*, 150 Ohio St.3d 409, 2016-Ohio-8295, 82 N.E.2d 1124, ¶ 18; *see also State v. Wilks*, __ Ohio St.3d __, 2018-Ohio-1562, __ N.E.3d __, ¶ 151. There are three factors courts generally consider to determine whether a defendant acted with prior calculation and design: (1) Did the accused and victim know each other, and if so, was that relationship strained? (2) Did the accused give thought or preparation to choosing the murder weapon or murder site? and (3) Was the act drawn out or an almost instantaneous eruption of events? *Walker* at ¶ 20. Although these factors provide guidelines, there is no bright-line test for prior calculation and design, and each case instead turns upon the particular evidence introduced at trial. *Walker* at ¶ 19; *State v. McWay*, 3d Dist. Allen No. 1-17-42, 2018-Ohio-3618, ¶ 16.

[1] In its brief the state claims that the jury convicted Phillips of aggravated murder in violation of R.C. 2903.01(C), which involves purposely causing the death of a person under 13 years old and does not require prior calculation and design. This is not true, as the victim, Phillips's mother, was over 13 years of age. We assume this reference is a typographical error.

{¶29} The state presented evidence that one to two days before Phillips killed his mother, a neighbor overheard an argument between them. His son Devon's testimony confirmed "[k]ind of a lot" of arguments, mostly involving money, between Phillips and his mother in the few days before her murder. Phillips confessed that he hit his mother repeatedly with a walking stick while asking that she repent for her sins, and that his anger for his mother had "built up" over time. Additionally, Phillips's brother, Shannon, testified that he found a letter in Phillips's handwriting under their mother's day planner; it stated that they would all be in heaven in two days.

{¶30} The evidence established that Phillips and Halcomb were son and mother, and that in the days leading up to her death their strained relationship was rife with arguments. And the letter indicates that Phillips had been planning the murder, rather than acting upon an almost instantaneous eruption of events. Therefore, the jury could justifiably conclude that Phillips was determined to complete a specific course of action. The jury's aggravated-murder conviction was supported by both sufficient evidence and the manifest weight of the evidence. We overrule Phillips's first assignment of error.

B. Prosecutorial Misconduct

{¶31} In his second assignment of error Phillips contends that the trial court committed plain error by not sua sponte striking the assistant prosecuting attorney's effort to vouch for Devon Phillips's credibility. During his closing argument, the assistant prosecuting attorney stated:

> The most powerful witness for me was Devon Phillips, this is a young man who came into an unfamiliar setting here, swore to tell the truth, knew the difference. * * * **I found him extremely creditable.**

(Emphasis added.)

1. Standard of Review

{¶32} As Phillips readily admits, his trial counsel did not object to the assistant prosecutor's statement so he forfeited all but plain error. *See, e.g., State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 123; *State v. Neal*, 2016-Ohio-64, 57 N.E.3d 272, ¶ 36 (4th Dist.). Appellate courts take notice of plain error "with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus; *State v. Bethel*, 4th Dist. Jackson No. 13CA11, 2014-Ohio-3861, ¶ 7. To prevail Phillips "must show that an error occurred, that the error was plain, and that but for the error, the outcome of the trial clearly would have been otherwise." *State v. Mammone*, 139 Ohio St.3d 467, 2014-Ohio-1942, 13 N.E.3d 1051, ¶ 69.

{¶33} " 'The test regarding prosecutorial misconduct in closing arguments is whether the remarks were improper and, if so, whether they prejudicially affected substantial rights of the defendant.' " *State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶ 149, quoting *State v. Smith*, 14 Ohio St.3d 13, 14, 470 N.E.2d 883 (1984). A prosecutor's conduct cannot be grounds for error unless the conduct deprived the defendant of a fair trial. *State v. Keenan*, 66 Ohio St.3d 402, 405, 613 N.E.2d 203 (1993). Thus "[t]he touchstone of the analysis 'is the fairness of the trial, not the culpability of the prosecutor.' " *Powell* at ¶ 149, quoting *Smith v. Phillips*, 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). "Prosecutors are granted wide latitude in closing argument, and the effect of any conduct of the prosecutor during closing argument must be considered in light of the entire case to determine whether the

accused was denied a fair trial." *Powell* at ¶ 149. The Supreme Court of Ohio has found that prosecutorial misconduct constitutes reversible error only in " 'rare instances.' " *Keenan* at 405, quoting *State v. DePew*, 38 Ohio St.3d 275, 288, 528 N.E.2d 542 (1998).

2. Vouching

{¶34} "It is improper for a prosecutor to vouch for the credibility of a witness at trial. Vouching occurs when the prosecutor implies knowledge of facts outside the record or places his or her personal credibility in issue." *State v. Myers*, __ Ohio St.3d __, 2018-Ohio-1903, __ N.E.3d __, ¶ 145. Consequently, "[a]n attorney may not express a personal belief or opinion as to the credibility of a witness." *Myers* at ¶ 145. Here, the assistant prosecutor improperly personally vouched for the credibility of Devon as a witness by telling the jury that he "found him extremely creditable."

{¶35} But mere improper conduct does not constitute prosecutorial misconduct unless it is the rare instance where the remark was so prejudicial that it deprived the defendant of a fair trial. This is not the rare case where the assistant prosecutor's closing argument constituted prosecutorial misconduct.

{¶36} First, the improper statement was isolated.

{¶37} Second, the trial court instructed the jury that the parties' counsel's statements and arguments were not to be considered as evidence in the case. *See State v. Clinton*, 153 Ohio St.3d 422, 2017-Ohio-9423, 108 N.E.3d 1, ¶ 52 ("A jury is presumed to follow the instructions given to it by the trial judge").

{¶38} Third, Phillips's trial counsel did not cross-examine Devon to contest his credibility so he appeared to concede the veracity of Devon's testimony.

{¶39} Fourth, the evidence of Phillips's guilt was overwhelming. *See State v. Dyer*, 4th Dist. Scioto No. 07CA3163, 2008-Ohio-2711, ¶ 48, quoting *State v. Treesh*, 90 Ohio St.3d 460, 464, 739 N.E.2d 749 (2001) (" 'An improper comment does not affect a substantial right of the accused if it is clear beyond a reasonable doubt that the jury would have found the defendant guilty even without the improper comments' "). Phillips confessed to beating his mother, he argued with her in the days leading up to when he killed her, he wrote a note that they would all be dead in a few days, he was found at the scene of the murder with her blood on his hands, ring, and sweatpants, he threatened to kill a paramedic "just like he did his mother," he gave clothes away, and asked a friend to be his pallbearer. Based on this overwhelming evidence, the solitary improper vouching by the assistant prosecutor during closing argument did not deprive him of a fair trial.

{¶40} The cases that Phillips cites are easily distinguishable. In *State v. LaFreniere*, 85 Ohio App.3d 840, 621 N.E.2d 812 (11th Dist.1993), the prosecutor's statements in closing argument included that the defendant's testimony was a pack of lies. This constituted plain error when considered collectively with the trial court's error in failing to give a jury instruction on an affirmative defense and an additional error admitting other-acts evidence. In *State v. Carpenter*, 116 Ohio App.3d 615, 688 N.E.2d 1090 (2d Dist.1996), the prosecutor improperly vouched for three witnesses. This case neither involved multiple errors that jointly resulted in prejudice to the defendant, *LaFreniere*, nor multiple instances of vouching, *Carpenter*. Therefore, the trial court did not err, much less plainly err, in failing to sua sponte strike the assistant prosecutor's improper statement.

C. Ineffective Assistance of Counsel

{¶41} In his third assignment of error Phillips claims that his trial counsel was ineffective for failing to object to the assistant prosecutor's vouching. To prevail on his claim Phillips must establish (1) deficient performance by counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) prejudice, i.e., a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Short*, 129 Ohio St.3d 360, 2011-Ohio-3641, 952 N.E.2d 1121, ¶ 113. The defendant has the burden of proof because in Ohio, a properly licensed attorney is presumed competent. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 62. And failure to satisfy either part of the test is fatal to the claim. *Strickland* at 697, 466 U.S. 668, 687, 104 S.Ct. 2052; *State v. Bradley*, 42 Ohio St.3d 136, 143, 538 N.E.2d 373 (1989).

{¶42} Even if we assume that Phillips's trial counsel provided deficient performance by failing to object to the improper vouching, Phillips cannot establish prejudice because of the overwhelming evidence of his guilt of aggravated murder in the case. *See* our disposition of the second assignment of error. We overrule his third assignment of error.

D. Excited Utterance

{¶43} In his fourth assignment of error Phillips argues that the trial court abused its discretion in admitting improper hearsay evidence. Tina Whitt testified to statements Devon made after she told him to look for his grandmother, e.g. he said that his grandmother was laying out back covered in blood and that she raised her hand up to

him, but did not speak. Phillips claims that Whitt's repetition of those statements constituted inadmissible hearsay, which his trial counsel objected to.

1. Standard of Review

{¶44} Generally we review decisions involving the admissibility of evidence under an abuse-of-discretion standard of review. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d 1032; *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶ 19 Under that review we do not disturb a trial court's ruling regarding the admissibility of evidence absent a clear showing of an abuse of discretion with attendant material prejudice to defendant. *State v. Green*, 184 Ohio App.3d 406, 2009-Ohio-5199, 921 N.E.2d 276, ¶ 14 (4th Dist.).

{¶45} However, when an appellant alleges that a trial court's evidentiary ruling was based on an erroneous standard or a misconstruction of the law, we review the trial court's evidentiary ruling using a de novo standard of review, rather than the general abuse of discretion analysis. *See State v. Wright*, 2017-Ohio-9041, 101 N.E.3d 496, ¶ 25 (4th Dist.), and the authority cited there. For instance, although the trial court generally has discretion to admit or exclude evidence, it has no discretion to admit hearsay, absent some explicit exception to the rule. *Id.* The parties here agree that as a matter of law, the contested testimony fit within the general scope of inadmissible hearsay.

{¶46} Thus the dispositive issue is whether the trial court erred in admitting the contested testimony under the excited-utterance exception to the hearsay rule. Insofar as this determination turned upon the fact-judging abilities of the trial court, it was within

its discretion, and is reviewed for an abuse of that discretion. *See generally JPMorgan Chase Bank v. Liggins*, 10th Dist. Franklin No. 15AP-242, 2016-Ohio-3528, ¶ 18.

2. Hearsay and Exceptions

{¶47} " '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). "Hearsay is not admissible except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Ohio, by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio, by these rules, or by other rules prescribed by the Supreme Court of Ohio." Evid.R. 802. The pertinent exception here is Evid.R. 803(2), the excited-utterance exception, which provides that "[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" is not excluded by the hearsay rule.

{¶48} Ohio courts apply the following four-part test to determine the admissibility of statements as an excited utterance:

> "(a) that there was some occurrence startling enough to produce a nervous excitement in the declarant, which was sufficient to still his reflective faculties and thereby make his statements and declarations the unreflective and sincere expression of his actual impressions and beliefs, and thus render his statement of declaration spontaneous and unreflective,
>
> "(b) that the statement or declaration, even if not strictly contemporaneous with its exciting cause, was made before there had been time for such nervous excitement to lose a domination over his reflective faculties so that such domination continued to remain sufficient to make 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 starling occurrence, and

> "(d) that the declarant had an opportunity to observe personally the matters asserted in his statement or declaration."

State v. Jones, 135 Ohio St.3d 10, 2012-Ohio-5677, 984 N.E.2d 948, ¶ 166, quoting *Potter v. Baker*, 162 Ohio St. 488, 124 N.E.2d 140 (1955), paragraph two of the syllabus. "The rationale of the rule is that circumstances surrounding the excited statement prevent the declarant from using reflective processes to fabricate a statement." *State v. Felts*, 2016-Ohio-2755, 52 N.E.3d 1223, ¶ 53 (4th Dist.).

{¶49} The evidence establishes that Whitt's recitation of Devon's statements fit within the excited-utterance exception to the general prohibition against hearsay evidence: (1) the beating of Devon's grandmother and her blood-covered body were startling enough to produce a nervous excitement in Devon (Whitt testified that Devon was "pretty hysterical" and was "screaming" at her); (2) Devon made his statements to Whitt within a few minutes after he had seen his grandmother, i.e. before that nervous excitement had dissipated; (3) the statements related to a startling event—the severe beating of his grandmother; and (4) Devon, the declarant, personally witnessed the condition of his grandmother.

{¶50} Phillips argues that there was "insufficient testimony or evidence to determine the amount of time that transpired between the discovery of the body and Devon's statements to Whitt." However, the jury could reasonably infer that a brief period of time elapsed from when Whitt instructed Devon to go to the back of the house to check for his grandmother to when he returned, in a hysterical state. Whitt also testified that Devon again described what he had seen within five to eight minutes of when he got back on the bus. And "[w]e also must recognize that 'children are likely to remain in a state of nervous excitement longer than would an adult in cases involving

hearsay statements by a child declarant.' " *Felts* at ¶ 56, quoting *State v. Taylor*, 66 Ohio St.3d 295, 304, 612 N.E.2d 316 (1993).

{¶51} Finally, Devon subsequently testified that he told Whitt he had seen his grandmother laying on the back porch bleeding. He was subject to cross-examination, but Phillips's trial counsel choose not to do so.

{¶52} Based on the excited-utterance exception to the hearsay rule, the trial court did not abuse its discretion in permitting Whitt to testify about what Devon told her. And because this evidence was also later introduced through Devon's testimony, even assuming an error, it was harmless beyond a reasonable doubt. We overrule Phillips's fourth assignment of error.

E. Prior Domestic-Violence Convictions

{¶53} In his fifth assignment of error Phillips asserts that the trial court abused its discretion by admitting a prior domestic-violence conviction into evidence because it was "superfluous." He claims the state charged him with domestic violence in this case for the sole purpose of introducing his prior domestic-violence conviction in order to prejudice him and mislead the jury. In fact, the trial court admitted **two** prior domestic-violence convictions, which were an essential element of Phillips's domestic-violence charge, to elevate his charge from a misdemeanor to a third-degree felony. *See* R.C. 2919.25(D)(4) ("If the offender previously has pleaded guilty to or been convicted of two or more offenses of domestic violence * * *, a violation of division (A) or (B) of this section is felony of the third degree").

1. Standard of Review

{¶54} Although Phillips objected to the introduction of these exhibits during Detective Spencer's testimony, he did not raise the alleged superfluous and pernicious grounds he now claims. Therefore, he forfeited all but plain error for this newly raised contention. *See State v. Lawson*, 4th Dist. Highland No. 14CA5, 2015-Ohio-189, ¶ 14; *see also* Painter and Pollis, *Ohio Appellate Practice*, § 1:36 (2018) ("An objection to the admission of evidence on one ground * * * does not, for purposes of appeal, preserve objections to the evidence on other grounds").

{¶55} And Phillips's trial counsel stated that he did not object to the admission of the exhibits of the prior domestic-violence convictions, other than redacting the name of the victim on one prior conviction, and redacting an additional drug-possession conviction on the second prior conviction. By stating he did not object to the admission of these prior convictions for the jury's consideration, he invited and thus forfeited even a plain-error claim. *See State v. Hall*, 4th Dist. Ross No. 13CA3391, 2014-Ohio-2959, ¶ 40 ("A party cannot base plain error on an act it has invited the court to make"); *State v. Hardie*, 4th Dist. Washington No. 14CA24, 2015-Ohio-1611, ¶ 11, citing *State v. Rohrbaugh*, 126 Ohio St.3d 421, 2010-Ohio-3286, 934 N.E.2d 920, ¶ 10 (invited error waives plain error).

2. No Error

{¶56} Nonetheless, we will address the merits of the assignment due to the nature and severity of the conviction. Here the trial court did not err, much less plainly err, by admitting the evidence of the prior convictions. They were required by the state to meet their burden of proof to establish the felony charge of domestic violence. In the absence of a stipulation by the parties, the trial court did not abuse its discretion in

admitting this evidence. *See State v. Schleiger*, 12th Dist. Preble No. CA2009-09-026, 2018-Ohio-2359, ¶ 15 ("[w]ithout a stipulation from [the defendant] as to any one of three prior convictions [to elevate the carrying a concealed weapon charge from a misdemeanor to a felony], the burden of proof remained on the state to prove [the defendant] had in fact been so convicted"). Beyond speculation, Phillips offers no support for his contention that the state's decision to charge domestic violence in this case was based up on some pernicious purpose. We overrule Phillips's fifth assignment of error.

F. Jury Instruction Not to Consider Phillips's Competence and Sanity

{¶57} In his sixth assignment of error Philips contends that the trial court erred by improperly instructing the jury not to consider his competence to stand trial or his sanity at the time of the offense. Over Phillips's objection the trial court instructed the jury that "[t]he issue of the defendant's competency and sanity have been addressed by the Court and are issues not to be considered by the jury."

1. Standard of Review

{¶58} Our review of whether a jury instruction is warranted is de novo. *State v. Depew*, 4th Dist. Ross App. No. 00CA2562, 2002-Ohio-6158, ¶ 24 ("While a trial court has some discretion in the actual wording of an instruction, the issue of whether an instruction is required presents a question of law for de novo review"). In determining whether to give a requested jury instruction, a trial court reviews the sufficiency of the evidence to support the requested instruction. *State v. Hively*, 4th Dist. Gallia No. 13CA15, 2015-Ohio-2297, 2015 WL 3745609, ¶ 20 (Harsha, J. dissenting on other

grounds). A trial court has no obligation to give an instruction if the evidence does not warrant it. *State v. Hamilton*, 4th Dist. Scioto No. 09CA3330, 2011-Ohio-2783, ¶ 70.

2. Jury Instructions

{¶59} "A criminal defendant has the right to expect that the trial court will give complete jury instructions on all issues raised by the evidence." *State v. Howard*, 4th Dist. Ross No. 07CA2948, 2007-Ohio-6331, ¶ 26. "[A] trial court should give a proposed jury instruction if it is a correct statement of the law and is applicable to the facts of the particular case." *Id.* citing *Murphy v. Carrollton Mfg. Co.*, 61 Ohio St.3d 585, 591, 575 N.E.2d 828 (1991).

{¶60} Phillips claims that based on *State v. Williford*, 49 Ohio St.3d 247, 551 N.E.2d 1279 (1990), paragraph three of the syllabus, the trial court erred by giving the contested instruction. He notes that he had already been found competent to stand trial by the trial court and evaluating doctors, and he had withdrawn his previous plea of not guilty by reason of insanity. Thus there were no issues of this nature for the jury to consider. In *Williford*, paragraph three of the syllabus, the Supreme Court of Ohio held that "[w]here the trial court fails to give a complete or correct jury instruction on the elements of the offense charged and the defenses thereto which are raised by the evidence, the error is preserved for appeal when the defendant objects in accordance with * * * Crim.R. 30(A) * * *."

{¶61} Here the contested jury instruction was neither incomplete nor incorrect. Although the trial court had no obligation to give this instruction, *Hamilton*, 2011-Ohio-2783, ¶ 70, it did not err in doing so because it constituted an accurate statement of what had occurred in the case. Moreover, it clarified any potential confusion of the jury

after it had heard evidence that Philips claimed he was "doing God's will" when he beat his mother to death. Finally, any arguable error in the instruction could not have prejudiced him considering the overwhelming evidence against him, including his confession and the physical DNA evidence tying him to the crime. We overrule Phillips's sixth assignment of error.

G. Evidence of Arguments with His Mother

{¶62} In his seventh assignment of error Phillips claims that the trial court abused its discretion by admitting evidence of the arguments he had with his mother because the probative value of this testimony was substantially outweighed by its prejudicial effect. *See* Evid.R. 403(A) ("Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury").

{¶63} Phillips forfeited any purported error by not raising this specific objection below. *See State v. Allen*, 4th Dist. Ross No. 16CA3538, 2017-Ohio-6878, ¶ 27, citing *Lawson*, 2015-Ohio-189, ¶ 14. And we need not consider any plain-error claim because he does not assert it on appeal. *See State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 17-20 (appellate court need not consider plain error where appellant fails to timely raise plain-error claim); *State v. Gannon*, 4th Dist. Lawrence No. 15CA16, 2016-Ohio-1007, ¶ 31 (we need not consider plain error when the appellant does not raise it).

{¶64} Nonetheless, we consider the merits of the assignment due to the nature and severity of the crime. Clearly, the trial court did not abuse its broad discretion in permitting this evidence. The arguments were relevant to the element of prior

calculation and design for the aggravated-murder charge, and provided a motive for the crimes. The court could correctly conclude that the probative value of this important evidence was not substantially outweighed by the danger of its unfair prejudice. *See State v. Ruble*, 2017-Ohio-7259, 96 N.E.3d 792, ¶ 30 (4th Dist.), quoting *State v. Markins*, 4th Dist. Scioto No. 10CA3387, 2013-Ohio-602, ¶ 67 (" 'evidence of the accused's own actions is not unfairly prejudicial as long as it is relevant to the essential elements of the offense' "). We overrule Phillips's seventh assignment of error.

H. Cumulative Error

{¶65} Finally, Phillips argues that cumulative errors committed during his trial deprived him of a fair trial and require a reversal of his convictions. "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, 656 N.E.2d 623 (1995), citing *State v. DeMarco*, 31 Ohio St.3d 191, 509 N.E.2d 1256 (1987), paragraph two of the syllabus. We reject Phillips's assertion because "[t]he doctrine is not applicable * * * as we do not find multiple instances of harmless error." *Garner* at 64. We have found only one instance of an improper, isolated statement by the state in its closing argument; *see* the second assignment of error. But even this improper statement did not result in any prejudicial error because Phillips has not established that he was deprived of his constitutional right to a fair trial. We overrule Phillips's eighth assignment of error.

IV. CONCLUSION

{¶66} The trial court did not commit reversible error in the conviction of Phillips for the aggravated murder of his mother. Having overruled Phillips's assignments of error, we affirm the judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Court of Common Pleas to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Hoover, P.J.: Concurs in Judgment and Opinion.
McFarland, J.: Concurs in Judgment and Opinion as to Assignments of Error 1, 2, 3, 4, 6 and 8; Concurs in Judgment Only as to Assignments of Error 5 and 7.

For the Court

BY: _____
William H. Harsha, 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.